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COURT OF APPEALS NO. 34321-5-II

KITSAP COUNTY DEPUTY SHERIFF'S GUILD; and DEPUTY BRIAN LAFRANCE and JANE DOE LAFRANCE, and the marital community composed thereof,

Appellant/Cross-Respondent,

v.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondent/Cross-Appellant.

PETITION FOR REVIEW TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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I. IDENTITY OF PETITIONER

Kitsap County Deputy Sheriff's Guild is the Petitioner.

II. COURT OF APPEALS DECISION

The Guild seeks review of *Kitsap County Deputy Sherriff's Guild v. Kitsap County*, No. 34321-5-II, published at 165 P.3d 1266 (2007).

III. ISSUES PRESENTED FOR REVIEW

The Guild presents the following issues:[1]

1. *Whether a final and binding labor arbitration award should be reviewed on the merits by a court to determine if the arbitrator adopted an appropriate remedy?*

2. *Whether a final and binding labor arbitration award reinstating a terminated deputy sheriff to employment should be set aside by a court on grounds that the award violated public policy because the misconduct that resulted in the termination included allegations of untruthfulness?*

3. *Whether an arbitration award reinstating an employee to employment subject to a fitness for duty examination prior to return to duty is violated when the employer refuses to reinstate the employee to a pay status?*

IV. STATEMENT OF THE CASE

This case concerns the Court of Appeals reversal of a Pierce County Superior Court order enforcing a labor arbitration decision. A copy of the arbitration decision is attached as Appendix C.

Brian LaFrance was a good, long term Kitsap County Deputy Sheriff who began having performance issues.[2] Over time LaFrance developed psychological problems that interfered with work including

[1] Issues 1 and 2 were addressed by the Court of Appeals but it did not reach Issue 3.
[2] Appendix C at 7-8. (CP 1214-15).

obsession and paranoia.[3] Much of LaFrance's obsession and paranoia involved his immediate supervisor, Lt. James Harris,[4] who he suspected was engaged in criminal activity.[5] Harris had a personal "relationship" with a prostitute employed at Roxanne's "escort service."[6] Not all LaFrance's paranoia lacked a reality basis: Harris had, in fact, at one point lifted an investigative file concerning Roxanne's from the Sheriff's property room and singled out LaFrance for harsh treatment.[7]

Harris ultimately resigned from the Department after being investigated for selling stolen property,[8] but not before he effectively recommended LaFrance's discharge. LaFrance faced a number of workplace investigations initiated by Harris.[9] LaFrance was terminated in November 2001.[10] The County alleged a number of instances of poor performance and then later added allegations of untruthfulness.[11]

The Guild grieved the discharge.[12] David Gaba was selected as arbitrator. After a hearing, Gaba concluded that the allegations had a factual basis but that the discipline was too harsh, setting it aside in favor of a written warning.[13] Gaba rejected the County's claim that LaFrance

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[3] *Id.* at 9-12. (CP 1216-1219).
[4] *Id.* at 12. (CP 1219).
[5] *Id.*
[6] *Id.* at 41 (CP 1248).
[7] *Id.* at 41-42. (CP 1248-49).
[8] *Id.* at 41. (CP 1248).
[9] *Id.* at 8-17. (CP 1215-1224).
[10] *Id.* at 22. (CP 1229).
[11] *Id.* at 29-30. (CP 1236-1237).
[12] *Id.* at 26. (CP 1233).
[13] *Id.* at 47. (CP 1254).

had intentionally lied during the investigation. Gaba described LaFrance's as "evasive, erratic and confused"[14] but *not* deliberately deceptive:

> It is fair to note that reasonable minds could differ as to the interpretation of Deputy LaFrance's behavior; for instance what the employer describes as the grievant "dodging, equivocal and double-tongued responses to questions about case reports, property and evidence" during the hearing could also be described as the wandering incoherent answers of an obviously ill ex-employee.[15]

Gaba also found that the County had not uniformly treated untruthfulness as a terminable offense.[16] Gaba ruled that the County had contributed to the situation by failing to address obvious mental health issues.[17] He rescinded the termination and ordered that LaFrance be allowed to return to full duty upon passing a fitness examination.[18]

By the parties labor agreement, the arbitration was to be "final and binding,"[19] but the County refused to reinstate LaFrance. The Guild filed suit in Pierce County Superior Court claiming breach of contract. The Guild asserted that LaFrance was entitled to a return to employment status with pay and that the fitness examination only served the purpose of whether LaFrance could return to active road deputy duty.[20] While that suit was pending, LaFrance passed a fitness examination.[21] The County then returned him to duty as a road deputy[22] but shortly thereafter filed its

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[14] *Id.* at 21. (CP 1228).
[15] *Id.* at 44, n. 75. (CP 1251).
[16] *Id.* at 40 (CP 1247).
[17] *Id.* at 44-45. (CP 1251-52).
[18] *Id.* at 46. (CP 1253).
[19] *Id.* at 1 (CP 1208).
[20] CP 3-7.
[21] CP 1119 ¶12.
[22] CP 1139 ¶13.

legal action, a Writ of Certiorari, claiming that the arbitration decision was illegal and void.[23]

Both parties filed cross motions for summary judgment.[24] The County presented new declarations *never presented to Gaba*, claiming that due to *Maryland v. Brady*[25] and the finding of untruthfulness,[26] LaFrance could not be reinstated. The Honorable John McCarthy dismissed both claims, finding the arbitration award valid but holding that the County owed LaFrance no back pay prior to the finding of fitness for duty.[27]

The County then appealed to the Court of Appeals, Division II and the Guild cross-appealed. The court reversed, finding that reinstatement of LaFrance violated "public policy." The decision was originally ordered to be unpublished but after the court received four separate motions to publish referencing the significant and precedential impact of the decision, it ordered publication.[28] The Guild moved for reconsideration which was denied. It now files this Petition for Review.

V. ARGUMENT

A. Summary of Argument

This Court should accept review of this matter because it involves numerous important questions of public sector labor law with statewide impact. The statewide impact is well documented by the successful

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[23] *See* CP 1122.
[24] CP 1119-35, 1454-69.
[25] 373 U.S. 83 (1963).
[26] CP 1139-40 ¶¶14-17.
[27] CP 1560-63, 1586-87.
[28] *See* Appendix D through G.

motions for publication brought by various statewide prosecutor organizations which are attached in the Appendices D, E, F and G.

This Court has firmly ruled that labor arbitration decisions contracted by the parties to be "final and binding" are to be treated as "final and binding" so that courts do not become involved in a re-examination of the merits. This deference also extends to recognizing the broad remedial authority of arbitrators.

The Guild submits this principle was not followed by the Court of Appeals. The court set aside this decision citing "public policy" as the basis. No Washington labor arbitration decision has ever been side aside on grounds of public policy. The Guild does not challenge the notion that public policy might in a *rare case* be warrant setting aside a labor arbitration award. The Guild's challenge is that the Court of Appeals, in adopting this exception for the first time in Washington, adopted it in a manner *substantially broader* than recognized in the extrajurisdictional case law.

In this case, the Court of Appeals found the arbitrator's order of reinstatement violated public policy because untruthfulness allegations had been sustained. This is problematic for a number of reasons: 1) The decision appears to adopt a *per se* standard regarding truthfulness that denies an arbitrator discretion to consider the nature, the context or mitigating factors involved in the statements; 2) The decision forces upon

public sector entities around the state a new standard punishment for truthfulness infractions not in accord with current practice or cognizant of principles of human nature; 3) The decision opens the door for a flood of litigation in public sector discipline cases in which losing public entities take a second bite at the apple in court.

This Guild also asks the Court to review another troubling aspect of the decision — its failure to appropriately weigh disability law mandates. In this case the arbitrator set aside the termination in part because the employee was disabled. The County's conduct had aggravated the disability so reinstatement was a just, equitable and sensible result.

B. This Court should accept Review Because the Court of Appeals Decision deviates from the Standard Adopted by this Court for extending a high degree of deference to Labor Arbitration Decisions.

1. The Court of Appeals deviated from this Court's directive in Clark County PUD v. Wilkinson not to review the merits of a labor arbitration decision.

Federal law has long recognized since the "Steelworker Trilogy" the presumptive validity of arbitration awards:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.[29]

[29] *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Washington courts have consistently followed the "Steelworker Trilogy." This position was most recently explained by the State Supreme Court in *Clark County PUD v. Wilkinson*[30] in overturning a decision of the Court of Appeals which assessed the merits of an arbitrator's decision.[31] In overturning the Court of Appeals, this Court restated its long-established acceptance of the Steelworkers Trilogy: "*When reviewing an arbitration proceeding, an appellate court does not reach the merits of the case.* The common law arbitration standard, applicable when judicial review is sought outside of any statutory scheme or any provision in the parties' agreement, requires this extremely limited review." [32]

Clark County P.U.D., in giving presumptive validity to the arbitration process, is consistent with previous Washington decisions adopting the Steelworkers Trilogy including this Court's decision in *Peninsula School District v. Public School Employees:*[33]

> Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which on its face is governed by the contract. (2) An order to arbitrate should not be denied unless it may be said with positive assurance the

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[30] 150 Wn. 2d 237, 76 P3d. 248 (2003).
[31] *Id.* at 250-51.
[32] *Id.* at 245 (emphasis supplied).
[33] 130 Wn. 2d 401, 413-14, 924 P.2d 13 (1996) (*quoting Council of County & City Employees v. Spokane County*, 32 Wn. App. 422, 424-25, 647 P.2d 1058 (1982).

> arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (3) There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.

The Court of Appeals erred by second guessing the arbitrator and imposing its own view of whether the discharge decision was for "just cause." Such a review of the merits of the arbitration decision is *precisely* what this Court ruled in *Clark County PUD* was *not* to occur.

2. The Court of Appeals deviated from case law that confers arbitrators with broad remedial authority.

While never recognized in Washington law, there is a body of extrajurisdictional case law that recognizes a very narrow exception to the principle of deference: Arbitration awards involving reinstatement can be set aside when reinstatement would violate public policy. Although this judicial authority has never been exercised in Washington, the Guild's Petition to this Court is not based upon the fact that the Court of Appeals recognized this exception; it is based on how they applied it.

Washington courts have *consistently* recognized that an arbitrator must have *broad authority* to grant remedies for the breach of the contract. As stated by the Court of Appeals, Division III in *IAFF v. City of Pasco,*[34] the authority of an arbitrator to decide the merits of a dispute includes broad authority to issue an appropriate remedy:

> Consistent with this [Steelworkers Trilogy] policy, Washington decisions allow arbitrators wide latitude in fashioning awards. *Endicott Educ. Ass'n v. Endicott Sch. Dist. 308*, 43 Wn. App. 392, 394-95, 717 P.2d 763 (1986); *see North Beach Educ. Ass'n v. North Beach Sch. Dist. 64*, 31 Wn. App. 77, 85-86, 639 P.2d 821 (1982).[35]

And the Court of Appeals Division II has itself previously concluded:

> The arbitrator must fashion a remedy appropriate with the seriousness of the contractual violation and the circumstances....We...decline to limit the remedies available to the arbitrator, but note that his limits are only those of his creativity subject to the bounds of [the law]... and the negotiated contract.[36]

Admittedly, the arbitrator's remedial authority is not limitless. It must be based on the four corners of the contract. Courts in other jurisdictions have not enforced an award when the remedy issued would violate public policy. But given the presumptive validity accorded labor arbitration decisions, this public policy exemption is very narrow.

No previous Washington published decision has ever set aside a labor arbitration decision on grounds of public policy. In *IBEW Local 77 v. Grays Harbor PUD,*[37] the court stated in dicta that "public policy is a ground for refusing to enforce a collective bargaining agreement," but it did not define the exception.

The Court of Appeals erred here by failing to recognize that any public policy exception should be exceedingly narrow. At the outset the

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[34] 53 Wn. App. 547, 768 P.2d 524 (1989).
[35] 53 Wn. App. at 550.
[36] *North Beach Educ. Ass'n*, 31 Wn. App. at 85-86.

Court of Appeals accurately summarized the public policy standard defined in federal case law: "If the contract as interpreted by an arbitrator violates some explicit, well-defined, and dominant public policy, we are not required to enforce it."[38] But the Court of Appeals erred in not recognizing the parameters of the exception. Federal case law makes clear:

- The standard involves not an assessment of the *general public interest* but instead whether there exists a *mandate in public policy found explicitly in case law or statute;*
- The public policy statement must be *unambiguous and clear;*
- The role of the court in a discipline case is *not* to consider the public policy involved in determining whether the discipline was for cause but is solely to consider whether an arbitrator, once having found no just cause and ordering reinstatement, *that the reinstatement order itself would violate public policy.*

The public policy exception as stated by the U.S. Supreme Court "is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[39] Applying the Supreme Court's mandate, the Ninth Circuit rejected an employer's claim that public policy prohibited the reinstatement of a careless mechanic, as it was illegal to operate a vehicle in an unsafe condition.[40]

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[37] 40 Wn.App 61, 696 P2d. 1264 (1985).
[38] Appendix A at 9.
[39] *W.R. Grace & Co. v. Rubber Workers Local 75,* 461 U.S. 757, 766 (1983) (quoting *Muschanv v. United States,* 324 U.S. 49, 66 (1945)).
[40] *Stead Motors v. Machinists Lodge, 1173,* 886 F.2d 1200 (9th Cir. 1989).

The Ninth Circuit stated such a claim exemplified a "general consideration of supposed public interests" and "represent[s] precisely what *Misco* and *Grace* tell us is insufficient to form an 'explicit well defined and dominant' public policy."[41]

The need for public policy to be unambiguous has been reiterated several times by the U.S. Supreme Court. In each case in which the Court stressed this point as it reaffirmed the arbitrator's award, *indicating that it is rare for a public policy to fit this narrow requirement.*[42] Courts do not reassess "just cause." As the U.S. Supreme Court explicitly stated, the question before a court is *not* "whether [the employee's misconduct] violates public policy, but whether the agreement to reinstate him does so."[43]

In short, the public policy exception to the enforcement of arbitration awards is extremely narrow. The Guild has found *no* Washington case in which a labor arbitration decision was set aside on grounds of "public policy." Courts in other jurisdictions have occasionally set aside arbitration reinstatements, but that infrequency demonstrates how truly narrow the public policy exception.

The narrow judicial role is exemplified by a recent decision by the Oregon Supreme Court with some strong parallels to the current case. In

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[41] *Stead Motors*, 86 F.2d at 1216.

Washington County Police Officers Association v. Washington County,[44] the court addressed whether public policy barred enforcement of an arbitrator's award that reinstated of a law enforcement officer who had tested positive on a drug test for marijuana and had also had lied about his drug usage:

> Thus, the enforceability of the arbitrator's award does not turn on whether the employee's purchase and personal use of marijuana or being dishonest about it in response to the positive drug test violated some public policy. The proper inquiry, instead, is whether the *award itself* complies with the specified kind of public policy requirements. In other words, does an award ordering *reinstatement* of an employee who has purchased and used marijuana and then been dishonest about it fail to comply with some public policy requirements that are clearly defined in the statute or judicial decision? If the reinstatement fails to comply with public policy requirements in that way, then it is unenforceable.[45]

The court concluded that a general public policy against the drugs did *not* create a bar to enforcement because only the most clearly defined public policies that would prohibit *reinstatement* could bar enforcement.

On remand the Oregon Court of Appeals, rejected the employer's claim that reinstatement of a dishonest officer was barred by public policy:

> Again, the precise question (in light of the Supreme Court's treatment of the drug-use question) is not whether public policy dictates that public safety officers should be honest. Rather, it is this: Does some statute or judicial opinion "outline, characterize, or delimit a public policy" against reinstating a

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[42] *W.R. Grace* , 461 U.S. 757; *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987); *Eastern Assoc. Coal Corp.*, 531 U.S. 57.
[43] 531 U.S. at 62-63.
[44] 335 Ore. 198, 63 P.3d 1167 (2003).
[45] 335 Ore. at 205.

> police officer whom an investigation has found to be, and who has admitted to having been, dishonest but who has not been convicted of dishonesty... "in such a way as to leave no serious doubt or question respecting the content or import of that policy"? 335 Ore. at 205-06. The county has suggested no such statute or judicial decision, and we cannot find one. We therefore affirm [the reinstatement]. [46]

The Court of Appeals in this case erred by substituting its judgment *about the alleged misconduct.* The appropriate question is *not* whether there was misconduct that members of the larger public might find offensive. The arbitrator weighs the just cause factors which include an assessment of the nature of the infraction—including all the circumstances and mitigating factors—and the appropriate penalty for such an infraction. The public policy exemption is only to be invoked if there is some public policy expressly grounded in law that bars reinstatement. Review in this case is needed to avoid a flood of challenges based on the Court of Appeals overbroad public policy standard.

C. This Court Should Accept Review Because it Involves Questions of Substantial Public Interest.

1. This case involves the important question of the extent to which final and binding public sector labor arbitration decisions are treated as final and binding.

In this case, the County relitigated a final arbitration award in the courts, presenting new evidence never presented in arbitration. By allowing the County a second bite at the apple, the Court of Appeals

[46] 87 Ore. App. 686, 791, 69 P.3d 767 (2003).

undermined the important policy of finality in labor decisions – *precisely what this Court had warned it about in Clark County PUD.*[47]

After facing the reinstatement of LaFrance, the County challenged the award in Superior Court, claiming *for the first time* that criminal discovery rules barred LaFrance's reinstatement.[48] But questions as to fitness for duty and qualifications should not be decided in court; *the parties have agreed that questions of "just cause" and other tenure issues must be submitted to an arbitrator.* Whether *Brady* disclosure requirements might affect LaFrance's tenure must be referred to the contract arbitration process and subject to a full and complete hearing, including the right of cross-examination.

This case demonstrates exactly how important it is that arbitration decisions be treated as final and binding. Focusing on certain aspects of the evidence (including, apparently, the County's after-the-fact Declarations), the Court of Appeals appeared to have misunderstood the actual arbitration findings. The Court of Appeals found that "LaFrance's proven record of dishonesty prevents him from useful service as a law enforcement officer"[49] but in fact, *the Arbitrator did not find that LaFrance intentionally lied.*

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[47] 150 Wn. 2d 237, 246 (2003).
[48] CP 1139-40, ¶14-17. (Declaration of Dennis Bonneville in Support of Motion to Present After Arising Counterclaims states that Undersheriff Bonneville did not pursue potential untruthfulness *until* LaFrance had already returned to work.)
[49] Appendix A at 10-11.

It is true that the Arbitrator sustained the employer's investigatory charges which involved "untruthfulness," but that finding of a *general class* of infraction is well short of a *specific finding* of intentional lying. Dishonesty can arise in a variety of contexts, many of which may be well short of an actual "lie." Lying involves the *intentional* making of a statement of fact that the teller *knows* to be false.

The County would like to recharacterize the Arbitrator's findings, but it cannot. Although Arbitrator Gaba cited LaFrance's lack of candor, *he stopped well short of a finding of deliberate and knowing untruthfulness*. Instead, Gaba attributed LaFrance's "bizarre" behavior to mental health problems, undermining any conclusion of intentionality.

Furthermore, the County is flatly incorrect as to *Brady*. *Brady* is a rule of discovery, *not* admissibility *and even less is it a rule about tenure rights under a labor contract "just cause" standard.* The absence of a finding of intentional lying takes this case out of the *Brady* requirement, but even if it did not, whether this results in LaFrance being disqualified from any position as a deputy sheriff is an issue the parties have agreed *only* an arbitrator can decide. The Court of Appeals erred by allowing the County a collateral and after-the-fact attack, an attack which undermines the important policy of final and binding arbitration.

2. This case involves the important question of whether any untruth by law enforcement personnel – no matter the nature, the context or

the mitigating factors – constitutes a per se disqualification from employment.

Setting aside the question of whether *any* intentional lie was made by LaFrance, *no evidence* was presented in the hearing that any single instance of lying would *per se* be grounds for discharge. In fact, the Arbitrator specifically credited evidence that previous instances of untruthfulness had led to discipline less than termination, in one instance *merely a verbal warning.*[50] For the County to argue that termination always follows a sustained untruthfulness allegation is itself disingenuous.

Lying is not a noble deed, yet it is unreasonable to conclude that a single instance of lying constitutes *per se* grounds for termination from law enforcement employment. Human nature being what it is, lies might be told — and will be told — in a variety of contexts with differing degrees of wrongfulness.[51] Law enforcement officers are not exempt from principles of human nature. Employees might report themselves sick when not, exaggerate their performance, minimize their speed, underestimate their tardiness, recharacterize their missteps, or embellish their accomplishments. Whether a wide variety of "untruths" that employees might utter warrant discipline should not be decided on any fixed test.

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[50] Appendix C at 40.

[51] As Otto Von Bismark once noted: "People never lie so much as after a hunt, during a war or before an election."

It is a large leap to conclude that any and all instances of untruthfulness automatically and inexorably require discharge. It is important for this Court to accept review because *this case is sending and will continue to send shock-waves through law enforcement agencies throughout the State of Washington.*[52] Law enforcement personnel are too human for anyone to really believe that they tell 100% of the truth 100% of the time. Even most police managers, we suspect, believe that discretion still needs to be allowed for context, frequency and mitigation. *Kitsap County's own previous discipline records, which include a verbal warning for a sustained untruthfulness allegation, bear that out.*

The Guild is not promoting untruthfulness. It is to be criticized and corrected. But ultimately whether instances of untruthfulness are grounds for discharge are — and should be — subject to the just cause standards of the labor contract and reviewed through binding arbitration. That is particularly the case where, as here, mitigating factors place the supposed untruthfulness into a different light.

The Motions to Publish attached as Appendices to this Petition bear out the precedent setting nature of this case. The Court of Appeals apparently adopts a per se rule barring reinstatement based on even a single instance of untruthfulness. But if that is not the intended principle,

[52] This is well documented by the Motions to Publish attached to this Petition in Appendices D, E, F and G.

it leaves open *even more* questions. If the case holding is that *some types of lying may* bar reinstatement while *some types may not*, the question then arises – how is that line to be determined? Other than a *per se* standard, no other workable standard emerges from the decision.

This Court should accept review to determine what the standard is and whether that decision should be made by the courts in after the fact challenges or in the agreed upon final and binding arbitration. Until this issue is resolved, public employers will refuse to abide by decisions to which they disagree and will clog the courts with their challenges.

3. This case involves the important question of whether labor arbitrators have the authority to create an appropriate remedy for violations of disability law violations.

The Guild also asserts the Court of Appeals misapplied the public policy exemption and overlooked another important public policy — *the strong and statutory public policy requiring accommodation of disabled employees.* The Court of Appeals erroneously concluded that no public policies favored reinstatement.[53]

Apart from the fact that the court was incorrect, the Guild submits application of a balancing test in this context is an error of law. Existing public policy case law from other jurisdictions does not call for a balancing test. Nor does that case law place a burden on the proponent of reinstatement to prove that public policy is advanced by reinstatement.

Arbitration awards are subject to a presumption of validity *and the employer alone bears the burden to show that public policy bars reinstatement.*

Second, *even if* some type of balancing test is to be applied, long and clearly established public policies require the accommodation of individuals with disabilities, including the Washington State Law Against Discrimination.[54] It was precisely these disability law mandates the arbitrator considered. He concluded that the County was, or should have been, aware of LaFrance's mental conditions which led to the misconduct that the County then sought to fire him for. Recognizing the inequity and the mitigation, the arbitrator reasonably provided LaFrance another opportunity to establish his fitness.

In *Stead v. Machinists Lodge*,[55] the Ninth Circuit articulated why an arbitrator's award of reinstatement of an employee who can be rehabilitated should be favored:

> Ordinarily, a court would be hard-pressed to find a public policy barring reinstatement in a case in which an arbitrator has, expressly or by implication, determined that the employee is subject to rehabilitation and therefore not likely to commit an act which violates public policy in the future. As *Misco* recognized, an arbitral judgment of an employee's "amenability

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[53] Appendix A at 10.
[54] RCW 49.60. Federal laws also mandate the accommodation of individuals with disabilities in a wide realm of activities. *See e.g.*, Americans With Disabilities Act, 42 U.S.C. §§ 1210 et seq.
[55] 886 F.2d 1200 (9th Cir. 1989).

> to discipline" is a factual determination which cannot be questioned or rejected by a reviewing court.[56]

In a later case the Ninth Circuit concluded that even though an employer articulated a "litany of federal regulations...mandating that commercial truck drivers be physically and mentally fit to perform their duties," the arbitrator's conclusion that the employee was fit for duty, after successfully passing several fitness for duty evaluations, foreclosed any determination that reinstatement could violate such a public policy.[57]

Using his clear authority to craft a remedy, the Arbitrator Gaba concluded that LaFrance decision might be amenable to rehabilitation. It was error for the Court of Appeals to vacate such a decision. This Court should grant the Guild's Petition to consider the relationship between the "public policy" bar to reinstatement in the context of a disability claim.

VI. CONCLUSION

For the foregoing reasons, this Court should grant the Guild's Petition for Review.

RESPECTFULLY SUBMITTED this 31st day of October, 2007, at Seattle, Washington.

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[56] *Id.* at 1213.
[57] *Teamsters v. BOC Gases*, 249 F.3d 1089 (9th Cir. 2001).

VII. APPENDIX A (COURT OF APPEALS DECISION)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KITSAP COUNTY DEPUTY SHERIFF'S GUILD; and DEPUTY BRIAN LAFRANCE and JANE DOE LAFRANCE, and the marital community composed thereof, Appellant/Cross-Respondent, v. KITSAP COUNTY and KITSAP COUNTY SHERIFF, Respondent/Cross-Appellant.	No. 34321-5-II UNPUBLISHED OPINION

PENOYAR, J. — The Kitsap County Sheriff's Office (the Sheriff) terminated Deputy Brian LaFrance for untruthfulness and erratic behavior. LaFrance and the Kitsap County Deputy Sheriff's Guild (the Guild) filed a grievance against his termination. The parties entered into arbitration, in accordance with their collective bargaining agreement. The arbitrator agreed that LaFrance had repeatedly been untruthful but decided that Kitsap County (the County) could not establish by clear and convincing evidence that termination was the proper form of discipline. It ordered the rescission of LaFrance's discharge and stated that LaFrance could return to full duty if he passed physical and psychological examinations. Ultimately, LaFrance did not feel that the County was acting to implement the arbitration award and he filed a complaint in superior court. Prior to trial, the County filed for summary judgment; it also filed a petition for writ of certiorari

requesting review and vacation of the arbitration award. Finding that no genuine issue of material fact existed as to the implementation of the arbitration award, the trial court granted the County's motion for summary judgment, but denied its petition for writ of certiorari. LaFrance and the Guild appeal the grant of summary judgment to the County and urge this court to grant them summary judgment instead. The County cross-appeals, arguing that the arbitration award was unenforceable, and, as such, the trial court was incorrect to deny its petition for writ of certiorari. We agree that the arbitration award was unenforceable as against public policy; we therefore reverse the trial court's denial of writ and vacate the arbitration award.

FACTS

I. TERMINATION

The Sheriff, the County, and the Guild are parties to a collective bargaining agreement (CBA) covering deputy sheriffs employed by the Sheriff.

After increasing concerns about Deputy LaFrance's work and behavior, the Chief of Detectives, Chief Davis, sent Deputy LaFrance a notice of decision and pre-termination hearing on September 11, 2001. The notice listed 29 sustained misconduct incidents and their attendant policy violations. About two months later, a *Loudermill*[1] hearing was held, which LaFrance attended.

On November 29, 2001, Chief Davis sent LaFrance a notice of termination detailing the specific incidents and violations that were sustained against him, pursuant to the *Loudermill* hearing. Chief Davis sustained the majority of the incidents outlined in the notice of decision

[1] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

and pre-termination. The sustained incidents affected 13 cases and included: (1) seizure contrary to Department policy; (2) failure to document case in records; (3) failure to treat documents and records according to procedure; (4) failure to follow orders to turn in materials; (5) failure to turn in overtime slips; (6) failure to document investigative activity in report form; (7) failure to properly handle evidence (4 times); (8) lack of candor; (9) failure to secure arrest warrant; (10) failure to file charges; (11) misrepresentation; (12) keeping evidence in his trunk (including computer discs and CDs containing child pornography and a pornographic VHS tape); (13) having an unsecured handgun; (14) failure to complete reports; (15) delay in completion of reports and paperwork; (16) failure to file case with federal prosecutors after advising the prosecuting attorney to drop State charges; (17) failure to return personal property to arrestee or to admit said property into evidence; (18) failure to properly handle paperwork; (19) downloading pornographic images onto a County computer and transferring them to a Sheriff's office computer; (20) mishandling photo evidence and original reports from Washington State Patrol; (21) failure to follow up on an attempt to locate suspect; (22) mishandling evidence; (23) failure to forward follow-up reports to records; (24) and failure to submit a case to the Prosecutor's Office.

The Guild filed a grievance challenging LaFrance's termination on January 10, 2002, claiming that the termination was not supported by just cause and requesting that LaFrance be reinstated with full back pay and benefits. The Sheriff denied the grievance. The Guild then requested that LaFrance's grievance be submitted to the American Arbitration Association under the terms of the CBA. An arbitrator heard the case in early 2004.

II. ARBITRATION

The arbitrator issued its decision on July 21, 2004. It found that the applicable standard of review was just cause — whether the employer had just cause to terminate the employee. It further found that the applicable burden of proof was clear, cogent, and convincing evidence, rather than a preponderance of the evidence, as the County urged.

To determine whether the County had just cause to terminate LaFrance, the arbitrator looked at seven factors: (1) whether the company gave the employee forewarning of the possible disciplinary consequences of the employee's conduct; (2) whether the company's rule was reasonably related to the orderly, efficient, and safe operation of the company's business and the performance that the employer might properly expect from the employee; (3) whether, before administering discipline, the employer made an effort to discover if the employee did in fact violate or disobey a rule or order of management; (4) whether the employer's investigation was conducted fairly and objectively; (5) whether there was substantial evidence that the employee was guilty as charged; (6) whether the employee applied its rules, orders, and penalties evenhandedly and without discrimination; and (7) whether the degree of discipline administered was reasonably related to both the seriousness of the offense and the record of the employee in his service to the employer.

The arbitrator found that the County established the first six elements by clear and convincing evidence, but not the seventh. It found the degree of discipline to be too harsh under the circumstances.

Specifically, it found that LaFrance "was terminated due to his inability to perform his job and his bizarre behavior" and not because he was the victim of a conspiracy, as he claimed.

7 Clerk's Papers (CP) at 78-79. However, it found that the County "failed to show by clear and convincing evidence that the penalty was appropriate for an employee who was clearly suffering from serious health problems." 1 CP at 82.

The arbitrator finally found that the County showed by a preponderance of the evidence that it had just cause to issue three separate final written warnings to LaFrance. It fashioned a remedy as follows:

> Since [LaFrance] was not fit for duty at the time of his discharge, he should be made whole by retroactively placing him in the position that he would otherwise have been in. Specifically, Deputy LaFrance should be allowed to access any benefits that an officer in good standing could have accessed as of his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by this [CBA]. Since Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay per se, but may keep any Unemployment Insurance benefits for which he is monetarily eligible.
>
> [LaFrance] should also be allowed to return to full duty upon passing independent psychological and physical fitness-for-duty exams as normally utilized by the [County]. The retroactivity of the return of [LaFrance] to regular status is not an issue in this case due to the lengthy continuance requested by the Guild and necessitated by Deputy LaFrance's heart attack.

1 CP at 83.

The arbitrator upheld the County's misconduct allegations but reduced the penalty to three final written warnings.

The award stated as follows:

> The grievance is granted in part and denied in part. Kitsap County has met its burden of proof in showing that Brian LaFrance was disciplined with just cause. The discharge of [LaFrance] is rescinded and he is allowed access to any benefits available to disabled employees as of his date of discharge. The [County] may impose Final Written Warnings for Untruthfulness, Incompetent Performance, and, Failure to Follow Rules and Directives.

1 CP at 84.

Because neither party prevailed, the arbitrator divided fees and expenses equally between the County and the Guild.

The County requested reconsideration, which the arbitrator denied, and the County and the Guild entered into settlement negotiations. The parties negotiated between September and December 2004, and LaFrance's employment was reinstated in October 2004. At that time, he was informed that he could return to full duty upon passing independent psychological and physical fitness-for-duty exams.

By December 2004, LaFrance felt that the County was not implementing the award and asked the Guild to seek its reinforcement. In March 2005, LaFrance was deemed physically fit to return to duty, and the police received a report that he was mentally fit for duty on April 6, 2005. On April 7, LaFrance was instructed to report to work on April 11 at which time he was assigned to a field-training officer for retraining. He was removed from full duty and placed on administrative leave with pay three months later when the Sheriff concluded that LaFrance was not fit for duty due to *Brady*[2] concerns about his ability to testify.

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194; 10 L. Ed. 2d 215 (1963) (a prosecutor must release information favorable to an accused upon request). If LaFrance were to testify as a witness in any criminal proceeding, the prosecutor would feel legally and ethically obligated under *Brady* to disclose LaFrance's history of untruthfulness to defense counsel.

III. TRIAL COURT

The Guild filed a complaint in Pierce County Superior Court for breach of contract and to enforce the arbitration award on December 17, 2004.[3] The County moved the court to dismiss for failure to state a claim, which the court denied. The County then filed a stay and petitioned for writ of certiorari to the Kitsap County Superior Court. The Guild filed a motion in that court requesting a change of venue, in order to consolidate the matter in Pierce County Superior Court, which the Kitsap County court granted.

The County then requested the Pierce County Superior Court for leave to assert an after-arising counterclaim — the petition for writ — and to add the Sheriff as a defendant. The Pierce County court granted the motion despite the Guild's opposition. The County then sought summary judgment on the issues in the Guild's complaint (breach of contract, enforcement of the arbitration award, and violations of the federal Fair Labor Standards Act (FLSA) and state wage laws). The Guild and LaFrance filed a cross-motion for summary judgment on the same issues.

The trial court found that the arbitrator had awarded reinstatement of LaFrance's employment effective November 29, 2001 (the date of his discharge), and that the award allowed LaFrance to access benefits that an officer in good standing could have accessed as of his discharge date. It also found that the arbitrator's award did not include an award of back wages, overtime, administrative leave pay, or any other wages. According to the trial court, the effective date of LaFrance's return to full duty and resumption of wages for hours worked was April 11, 2005 (after he had been cleared and reported for work). The court also noted that

[3] The complaint was later amended to include claims under the Fair Labor Standards Act and Washington State wage laws.

LaFrance was offered benefits when the County offered him an election between reinstatement of his leave benefits and payout of his leave benefits, but LaFrance never made an election. Finally, it found that the Guild's claim that the County breached the CBA when it did not remove letters regarding LaFrance's termination from his personnel file was a breach of contract claim and therefore subject to the CBA's mandatory arbitration provisions. Holding that no genuine issue of material fact existed, the court granted the County's motion for summary judgment and denied the Guild's.

The trial court also entered an order denying the County's petition for writ of certiorari, concluding that the trial court should not interfere "with the decision-making process that the parties negotiated and contracted to complete." Report of Proceedings (RP) (Dec. 15, 2005) at 31.

The Guild and LaFrance appeal the trial court's decision granting summary judgment to the County and the Sheriff. The County and the Sheriff cross-appeal the trial court's denial of their petition for certiorari.

ANALYSIS

I. DENIAL OF MOTION FOR WRIT AND REVERSAL OF ARBITRATOR'S DECISION

The County argues that the arbitrator exceeded his jurisdiction and authority under the CBA by requiring reinstatement of LaFrance's employment after concluding that LaFrance was guilty of untruthfulness. In part, the County contends that the arbitrator offended public policy by reinstating LaFrance's employment after finding that he was guilty of untruthfulness. We agree.

Washington public policy strongly favors finality of arbitration awards. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Accordingly, our Supreme Court has set out an extremely limited standard of review for arbitration awards. *Clark County PUD No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wn.2d 237, 246, 76 P.3d 248 (2003). Review of an arbitration decision under a constitutional writ of certiorari is limited to whether the arbitrator acted illegally by exceeding its authority under the contract. *Clark County PUD No. 1*, 150 Wn.2d at 245. When reviewing an arbitration proceeding, an appellate court does not reach the merits of the case. *Clark County PUD No. 1*, 150 Wn.2d at 245. The doctrine of common law arbitration states that the arbitrator is the final judge of both the facts and the law, and "no review will lie for a mistake in either." *Clark County PUD No. 1*, 150 Wn.2d at 245 (citing *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 785, 812 P.2d 500 (1991)).

However, as with any contract, a court may not enforce a collective-bargaining agreement that is contrary to public policy. *See W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983); *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000). If the contract as interpreted by an arbitrator violates some explicit, well-defined, and dominant public policy, we are not required to enforce it. *W.R. Grace & Co.*, 461 U.S. at 766 (citing *Hurd v. Hodge*, 334 U.S. 24, 35, 68 S. Ct. 847, 92 L. Ed. 1187 (1948) and *Muschany v. United States*, 324 U.S. 49, 66, 65 S. Ct. 442, 89 L. Ed. 744 (1945)).

In *E. Associated Coal Corp.*, the Supreme Court examined the legality of an arbitration award requiring an employer to reinstate a truck driver who had tested positive for marijuana. 531 U.S. at 59-60. The arbitrator had decided that the driver's positive drug test did not amount

to "just cause" for discharge, as required by the parties' collective bargaining agreement. 531 U.S. at 60. Because the employer and the union granted the arbitrator the authority to interpret their agreement, the Court stated that, in order to properly consider the claim, it must assume that the collective bargaining agreement itself called for the reinstatement. 531 U.S. at 61. Therefore, the central issue of the case was whether a contractual reinstatement requirement would render the collective bargaining agreement void as against public policy. 531 U.S. at 62.

In that case, the court upheld the reinstatement provision, finding that the public policy against intoxicated drivers, as set out in the Omnibus Transportation Employee Testing Act of 1991, was balanced by the Act's equal emphasis on the public policy of rehabilitation. 531 U.S. at 64-65. Because the reinstatement award was not contrary to the several policies, taken together, the award was not void as against public policy. 531 U.S. 65.

In contrast, LaFrance's reinstatement violates several public policies regarding a police officer's duties to the public. For example, RCW 36.28.010 requires sheriff's deputies to arrest all persons who break the peace, defend the county against those who endanger public peace, execute court and judicial officer orders, and execute all warrants from other public officers. In violation of these clear duties, LaFrance mishandled evidence, neglected to obtain warrants, failed to follow through on cases with prosecutors, and generally conducted himself with a lack of candor.

Also in contrast to *E. Associated Coal Corp.*, here there are no "dominant" public policies favoring reinstatement. LaFrance repeatedly showed a lack of candor and inability to obey either sheriff's department policies, Washington Rules of Evidence, or direct orders from his superiors. Put simply, LaFrance's proven record of dishonesty prevents him from useful

service as a law enforcement officer. To require his reinstatement to a position of great public trust in which he cannot possibly serve violates public policy. Therefore, we must reverse the trial court's denial of the petition for writ of certiorari and vacate the arbitration award.

The balance of the issues raised by the parties are rendered moot by the foregoing, and we decline to address them.[4]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.

[4] The appellants included a request for attorney fees regarding FLSA and state wage law violations. However, the appellants did not prevail here, and their request is denied. Moreover, neither party devoted a section of their opening brief to the request for attorney fees as RAP 18.1(b) requires; we therefore deny an award of attorney fees to either party. *See Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996).

VIII. APPENDIX B (ORDER DENYING RECONSIDERATION)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KITSAP COUNTY DEPUTY SHERIFFS GUILD; and DEPUTY BRIAN LAFRANCE and JANE DOE LAFRANCE; and the marital community composed thereof,

Appellant/Cross-Respondent,

v.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondent/Cross-Appellant.

No. 34321-5-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the court's decision terminating review, filed June 26, 2007. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bridgewater, Penoyar, Quinn-Brintnall

DATED this 28th day of August, 2007.

FOR THE COURT:

PRESIDING JUDGE

Brian & Jane Doe La France
Jacquelyn Moore Aufderheide
George E. Merker, III
Pamela Beth Loginsky
Howard Goodfriend
Mark Hutcheson
Daniel B. Heid

IX. APPENDIX C (ARBITRATOR'S AWARD)

American Arbitration Association

In the Matter of an Arbitration

Between

KITSAP COUNTY DEPUTY SHERIFF'S GUILD

And

KITSAP COUNTY

(Brian LaFrance Termination; 75 L 390 00293 02)

ARBITRATOR'S

DECISION AND AWARD

I. INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the KITSAP COUNTY DEPUTY SHERIFF'S GUILD (hereinafter the GUILD), on behalf of Brian LaFrance, and KITSAP COUNTY (hereinafter the EMPLOYER or the COUNTY), under which DAVID GABA was selected to serve as Arbitrator and under which his Award shall be final and binding among the parties.

A hearing was held before Arbitrator Gaba on January 21-23, 2004; January 26-27, 2004; February 23-24, 2004; March 11-12, 2004; March 31, 2004; and April 1, 2004, at Port Orchard, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. A transcript of the proceedings was provided. The County filed its post-hearing brief on June 17, 2004, and the Guild filed its post-hearing brief on June 18, 2004.

APPEARANCES:

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Jacquelyn M. Aufderheide
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II. ISSUES

During the period of time relevant to this Arbitration, the Kitsap County Deputy Sheriff's Guild and Kitsap County were parties to a collective bargaining agreement dated from January 1, 2000 through December 31, 2002.

The parties did not stipulate to the issue. I find the issue to be as follows:

Did the County discipline Brian LaFrance without just cause, and if so, what is the appropriate remedy?

III. CONTRACT PROVISIONS

In Article I, Section 1, Rights of Management, the Collective Bargaining Agreement provides that the Kitsap County Sheriff's Office has "the right to discipline or discharge employees for just cause."[1]

The Kitsap County Sheriff's Office Policy and Procedure Manual contains the following policies that are relevant to the alleged violations:[2]

3.05.02 AUTHORIZATION FOR FIREARMS ----

F) Members shall provide secure storage for all firearms, whether owned personally or by the department.

4.01.02 COMPETENCE — All members and employees of this department are expected to carry out their assigned duties in a competent and efficient manner.

a) Incompetence may be demonstrated by the following actions:

1) Lack of knowledge of the application of the laws required to be enforced;

2) An unwillingness or inability to perform assigned tasks;

3) Failure to conform to work standards established for the officer's rank, grade or position;

4) The failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention;

5) Repeated work evaluations indicating substandard performance;

6) Lack of knowledge of department policy or procedure.

4.01.03 COMPLIANCE WITH ORDERS ---- Officers shall promptly obey any lawful order of a superior officer. Any officer who refuses to obey a lawful order will be considered insubordinate.

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[1] Exhibit E-1.
[2] Exhibit E-3.

4.02.02 NEGLECT OF DUTY (DEFINED) ---- The following actions, when performed by officers while on duty, may be considered "Neglect of Duty":

d) Failure to submit all necessary reports on time and in accordance with departmental procedures;

e) Failure to respond in a prompt manner, appropriate to the circumstances when dispatched or ordered to respond to a situation. Postponing a response or failure to respond will be considered neglect of duty; . . .

4.02.03 CONDUCT TOWARDS OTHERS ---- Employees shall observe the following rules of conduct when dealing with the public or other officers:

a) All officers and employees shall conduct themselves in a manner that will foster the greatest harmony and cooperation between themselves and units of the department. . .

6.01.01 RECORDS AND REPORTS (GENERAL) ---- Reports are the official memory of the department. They are necessary for establishing a case against offenders; for informing the department of existing crime problems and enforcement needs; for preparing budget requests and for protecting the investigating officer, the department, and the public against unwarranted civil action. For these reasons, officers will complete all reports in an accurate, legible manner and will submit them through the proper channels immediately upon completion. . .

6.01.03 REPORTS (TIMELY AND ACCURATE) ---- Officers shall submit necessary reports on time and in accordance with established departmental procedures. Reports submitted by an officer shall be truthful and complete, and no officer shall knowingly enter or cause to be entered any inaccurate, false or improper information. Reports submitted late on account of laziness or inattention to duty shall be considered an act of incompetence.

6.01.06 REPORTS (GENERAL) ---- Compliant [sic] reports must be made on all contacts and investigations EXCEPT in cases where the complaint is unfounded or on certain patrol checks where the CenCom event card may suffice.

A) Officers should use discretion in deciding when not to file a report. In many cases the information may be useful to other divisions within the department. When an officer is in doubt, his supervisor should be consulted.

. . . D) Information reports are required in all instances where the information concerns criminal activity or officer safety.

6.01.07 RECORDS, REPORTS, PROPERTY AND EVIDENCE ----

D) . . .

3) EVIDENCE is that property which is found at or near the scene of a crime and items related to or suspected of being used in, or pertaining to the commission of a crime or in the identification of a suspect.

E) The chain of evidence shall be preserved by all personnel transferring property either between precincts or between officers by noting changes in custody on the reverse of the card stock copy.

6.03.01 PROPERTY AND EVIDENCE (GENERAL POLICY) ---- It is the duty of all deputys [sic] to care for, control and process correctly all evidence or property that may come into their possession. Every officer shall maintain a sufficient chain of evidence for the courts. At no time will a member of this department remove, use, loan, give, or otherwise dispose of any property in a manner contrary to law.

6.03.02 PROPERTY DEFINITIONS ---- For the purposes of this section property may be broken into four categories: Evidence, Contraband, Safekeeping, and Found property.

A) EVIDENCE: Items found at or near the scene of a crime, and items related to or suspected of being used in or pertaining to the commission of a crime or in the identification of a suspect are defined as evidence property. Evidence is one or more items of property which an officer has reason to take custody of as a result of an arrest or investigation and is or may be a legal exhibit in a criminal court proceeding. All items of evidence shall be inventoried on a Property Report Form and immediately secured in the Evidence/Property Room unless the nature of the item precludes it from being stored therein.

B) CONTRABAND: Contraband is an item of property which is illegal for a private citizen to possess and which an officer takes custody of for the purposes of disposal or destruction. All items of contraband shall be inventoried on a Property Report Form and immediately secured in the Evidence/Property Room unless the nature of the item precludes it from being stored therein.

6.03.03 RECORDS, REPORTS, PROPERTY AND EVIDENCE ----

. . . D) HANDLING PROCEDURE

1. GENERAL POLICY: All items placed in property shall be properly inventoried, sealed and tagged. Tags used to supplement Property Report

Forms shall bear the case number, officer's name, date, and time.

. . . 4. DOCUMENTS: Documents such as car titles, checks, letters, telephone bills, etc. should be placed in a clear plastic envelope prior to submission to the property room. In addition a photocopy should be made and included with the case report or attached to the CR form. Copies should be distinguished from originals by an appropriate notation.

6.03.15 PROPERTY AND EVIDENCE (CONVERSION) ---- Officers shall not, under any circumstances, convert to their own use any item of property coming into their possession in the course of their official duties, nor shall officers destroy any such item of property or evidence.

The following Kitsap County Civil Service Rules are relevant to the alleged violations:[3]

Section 11.3 Discipline—Good Cause—Illustrated. The following are declared to illustrate adequate causes for discipline; discipline may be made for any other good cause:

11.3.01 Incompetency, inefficiency, inattention to, or dereliction of duty.

11.3.02 Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow employee, any other act of omission or commission tending to injure the public service, or any other willful failure on the part of the employee to properly conduct himself.

11.3.04 Dishonest, disgraceful, or prejudicial conduct.

11.3.08 Willful or intentional violation of any lawful and reasonable regulation, order or direction made or given by a superior officer.

11.3.10 Violation of reasonable requirements promulgated by the Sheriff's Written Rules.

IV. FACTS

Sheriff Steve Boyer heads the Kitsap County Sheriff's Office (KCSO). Reporting to Undersheriff Dennis Bonneville, who is second in command, are the chiefs of the Divisions of Patrol, Detectives, and Corrections; the Chief Civil Deputy; and the Office of Professional

[3] Exhibit E-3.

Standards. Mike Davis, Chief of Detectives, supervises the Detective Lieutenant, who in turn supervises all deputies assigned to the Detectives Division. During the period relevant to this grievance, Lieutenant James Harris was the Detective Lieutenant, with approximately twelve (12) detectives reporting directly to him. Wayne Gulla was the Chief of Patrol, and supervised two patrol lieutenants, approximately nine (9) sergeants, and all patrol deputies.

Brian LaFrance was hired by KCSO in December, 1986. Subsequent to his completion of the Academy and the field training officer program, he was assigned to the Patrol Division. During his fourteen years of service with the KCSO he performed his job at least adequately (while it is difficult to tell from his performance appraisals, he appeared to be a good Deputy and might have obtained higher than average appraisals).

During his fourteen year tenure with Kitsap County, Officer LaFrance was disciplined several times. In addition he was, as many employees are, "counseled" on his performance evaluation. Specifically, in a performance evaluation dated January 12, 1988, Deputy LaFrance was counseled for being "argumentative" and for "rationalizing", and was directed to "[a]ccept direction in a constructive spirit" and to "[r]ecognize that procedures have been established by the department and comply."[4] On September 27, 1988, Deputy LaFrance was counseled to "[c]heck with supervisor prior to handling details or follow-ups in o/t capacity."[5] On October 12, 1988, Deputy LaFrance received a one-day suspension for having been involved in three traffic accidents during his first two years of service.[6]

In 1991 Deputy LaFrance transferred to the Warrants Division, where he worked under the Chief of Corrections. On March 6 of that year, he received a Letter of Reprimand citing "too

[4] Exhibit D-1.
[5] Exhibit D-1.
[6] Exhibit D-1.

many open and uncompleted follow-ups."[7]

On August 14, 1997, Deputy LaFrance had a letter placed in his file pertaining to a traffic accident that was categorized as "chargeable and preventable."[8]

Deputy LaFrance received another Letter of Reprimand on April 9, 1998 for "Failure to follow directive by not being properly identified."[9] Deputy LaFrance accepted the criticism he received and continued to perform his job in an acceptable manner.

In 1999, supervision of the deputies handling warrants was transferred to the Detectives Division. Deputy LaFrance continued to handle warrants, but he was also temporarily assigned to investigate cases in the Detectives Division. At the time that Deputy LaFrance was made part of the Detective Division he received no training and was not assigned a Field Training Officer by Lt. Harris. Deputy LaFrance began handling routine Detective matters and soon had a full Detective caseload. At this time Deputy LaFrance attempted to learn the duties of a Detective by talking to his fellow officers. His new supervisor Lt. Harris provided LaFrance with no on-the-job training.

On December 3, 1999, Deputy LaFrance was counseled for failing to report to work at 0800 and for failing to keep Lieutenant Harris apprised of his activities. Later that same month, Deputy LaFrance received a Performance Appraisal Report. In conjunction with that evaluation, Lieutenant Harris gave Deputy LaFrance a Development Plan which addressed performance areas in need of improvement, pertaining to time management, regular reporting to his supervisor, adherence to a work schedule, and limiting his caseload.[10]

On May 25, 2000, in response to ongoing concerns about Deputy LaFrance continuing to

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[7] Exhibit D-1.
[8] Exhibit D-1.
[9] Exhibit D-1.
[10] Exhibit E-4, Exhibit E-16.

work outside his scheduled shift and failing to complete his open cases, Lieutenant Harris provided the Deputy with a documented counseling. Deputy LaFrance was instructed not to work outside of his regular work schedule unless his doing so was approved in advance by either the Lieutenant or by Chief Davis, and he was instructed that failure to follow this directive might result in further discipline. The number of cases he had open was categorized as unacceptably large, and he was faulted for failing to apprise the Lieutenant of the status of his current projects.[11] It was at this time that one could begin to categorize Deputy LaFrance's behavior as unusual. Deputy LaFrance had been assigned to a child pornography taskforce during this time period and at some time became fixated on the work and on "protecting the children." Deputy LaFrance's behavior during this time could be described as obsessive in regard to his child pornography cases.

On May 30, 2000, Lieutenant Harris sent a memo to Deputy LaFrance regarding his having adjusted his schedule without first talking to Lieutenant Harris or Chief Davis, and failing to advise the Lieutenant prior to attending a meeting of the Child Pornography Taskforce in Seattle.[12] During this time Deputy LaFrance began to demonstrate a belief that he was being conspired against by Lt. Harris and others. While Deputy LaFrance clearly did not have the resources to perform his child pornography investigations as he saw fit, Lt. Harris had little interest in providing him with more or better equipment and was incapable of understanding the requests that Deputy LaFrance was making.

On August 1, 2000, Lieutenant Harris gave Deputy LaFrance a documented Verbal Reprimand regarding open cases and time management, again addressing the issue of acceptable open case load, which was to be rectified by September 1, and warning the Deputy that failure to

[11] Exhibit E-16.
[12] Exhibit E-16.

comply would lead to progressive discipline or reassignment to another division.[13] By this time it appears that Deputy LaFrance was becoming more obsessive in his behaviors, and that his feelings of persecution were being openly manifested.

On October 3, 2000, Lieutenant Harris sent Deputy LaFrance a memorandum outlining further concerns regarding work outside his shift and directing the Deputy to maintain a daily log sheet describing his planned activities for the following day. This log was categorized as mandatory. Lieutenant Harris also again reminded Deputy LaFrance not to work outside his scheduled shift without prior approval.[14].

Lieutenant Harris and Chief Davis met with Deputy LaFrance on October 6, 2000. This meeting was documented in a memorandum from the Lieutenant to the Deputy dated October 16. The memorandum confirmed that all parties had agreed Deputy LaFrance would be given a three-week window wherein he would not be given any new cases but would rather be expected to concentrate on clearing his current cases. He was instructed to continue to submit daily activity logs, and was also instructed to submit a report to the Lieutenant itemizing all cases he was working on, their current status, and a projection of the timeline and activities that would be needed to complete them.[15] On October 10, the Lieutenant sent Deputy LaFrance an e-mail giving him until October 11 to submit the case list.[16] While the Employer maintained that Deputy LaFrance never complied with the order to submit a case list, it was produced at the hearing and indicated that Deputy LaFrance had a number of cases that were not listed on Lt. Harris' tracking system. While there was testimony at the hearing indicating that Harris used extra case assignments to punish Deputies, it is unclear how many of these additional cases were

[13] Exhibit E-5.
[14] Exhibit E-6.
[15] Exhibit E-8.
[16] Exhibit E-7.

assigned by Harris verses how many investigations Deputy LaFrance simply started himself.

On October 18, 2000, Deputy LaFrance received an e-mail from Lieutenant Harris which included the text of an October 13 e-mail from Lieutenant Harris to Deputy LaFrance regarding the latter having worked outside his shift on October 11, together with the text of Deputy LaFrance's October 17 e-mail reply. In this e-mail the Lieutenant commented on the Deputy having worked outside of his shift again on October 17; he requested overtime slips for the time referenced, and again emphasized that all work outside of shift must be pre-approved. Lieutenant Harris instructed Deputy LaFrance to contact him in order to arrange a meeting with both himself and the Chief later that day for further discussion of this issue.[17]

On October 19, 2000, Lieutenant Harris sent Deputy LaFrance a Letter of Reprimand with a subject line indicating it was for failure to comply with an order. The Letter specifically referenced Policy 4.01.03 and addressed the Deputy's continuing to work outside of his regularly scheduled shift, despite repeated admonishments that he do so only when approval was obtained in advance.[18] By this time Deputy LaFrance was working additional hours to try to accomplish what he saw as his job.[19] By this time it is also obvious in hindsight that Deputy LaFrance was disabled and incapable of performing his job.

In the fall of 2000, the Guild notified the Kitsap County Sheriff's Office of its concerns about deputies being temporarily assigned to the Detectives Division, inasmuch as those positions were supposed to be competitively filled. The Guild specifically objected to the continued "temporary" assignment of Deputy LaFrance and Deputy Rich Smith to two of those positions. In response to these concerns, Deputy LaFrance was notified in late October or early

[17] Exhibit E-9.
[18] Exhibit E-11.
[19] It should be noted that Deputy LaFrance's view of his job was far different and more encompassing than what Lt. Harris, the KCSO, or any rational police department would expect.

November that he and Deputy Smith were being reassigned to the Patrol Division effective December 15, 2000. In preparation for this reassignment, Chief Davis and Lieutenant Harris met with Deputy LaFrance to create a time-table for completion of several tasks. In a memorandum dated November 6, 2000, Lieutenant Harris instructed Deputy LaFrance to complete whatever portion of his assigned cases he could by November 10, upon which date he was to return all uncompleted cases to the Lieutenant. Deputy LaFrance was asked to bring his office back to its original condition with only one tabletop computer, to return any equipment assigned to the Detectives Division by November 10, and to obtain a patrol uniform by that date. In that same memorandum, Lieutenant Harris instructed Deputy LaFrance to make a priority of the latter three matters, with case completion to be attended to only after they were completed.[20] Deputy LaFrance was given adequate time to perform his assigned tasks but failed to do so; he saw his transfer as a manifestation of a wide-ranging conspiracy against him and believed that Lt. Harris was the ring-leader of the conspiracy. LaFrance also believed that Lt. Harris was engaged in illegal activities and was consorting with known prostitutes.

On December 1, 2000, Lieutenant Harris sent LaFrance an e-mail instructing him to turn in his open case files by December 6, 2000, as he had not complied with the November 10 deadline.[21] LaFrance's sense of paranoia increased, as did his delusions of persecution and his feelings that he was the only person standing between the children of Kitsap County and child pornography. By this time a reasonable supervisor would have, at the least, sent Deputy LaFrance for both medical and psychological fitness-for-duty examinations. He would have failed both.

On December 11, 2000, Lieutenant Harris responded to an e-mail from Deputy LaFrance

[20] Exhibit E-11.
[21] Exhibit E-12.

about his workload and status by indicating the Deputy still had not returned the twelve (12) assigned cases or his computer equipment, and noting that there were boxes of files and paperwork that still needed to be processed. Deputy LaFrance in his e-mail had indicated that he had worked ten (10) hours of overtime on the weekend.[22]

On December 13, 2000, Lieutenant Harris sent Deputy LaFrance two nearly identical e-mails addressing the latter's failure to complete the mandated tasks (returning his office and equipment to original condition, returning open cases files, and refraining from working off the clock).[23] Lieutenant Harris directed Deputy LaFrance to turn in overtime slips for his weekend work and explain who, if anyone, had pre-approved the overtime work, what work was performed, and what the Deputy meant when he stated in his December 11 e-mail that he had "converted" his hours. Records establish that Deputy LaFrance opened both of these e-mails on December 13, at 11:18 p.m. and 11:19 p.m., respectively.[24]

By December 15, 2000, Deputy LaFrance had neither cleaned out his office nor returned case files and equipment. Deputy Mike Rodrigue was scheduled to occupy Deputy LaFrance's office the following Monday. At this point, Lieutenant Harris instructed Detectives James McDonough and Doug Dillard, and Trina Washburn, the Administrative Support Specialist for the Detectives Division, to pack up all materials in that office and place them into property. This was done, and the Lieutenant sent Deputy LaFrance a memorandum on that day informing him that his office had been cleaned out, that all items had been inventoried and placed into property, and that he was to leave whatever property he still retained in his office, leave his cases in Lieutenant Harris's mailbox, and put his keys in an envelope and slide it under the Lieutenant's

[22] Exhibit E-16.
[23] Exhibit E-14, Exhibit E-16.
[24] Exhibit E-16.

door. He was also once again admonished not to work off the clock.[25]

In a letter dated December 27, 2000, Lieutenant Harris, writing on behalf of Sheriff Steve Boyer, advised Deputy LaFrance that an internal investigation would be conducted to determine if he had violated Policy 4.01.03 in failing to comply with direct orders regarding: (1) not working beyond his scheduled hours without prior authorization, (2) submission of overtime slips for all overtime worked, (3) surrender of case files and a case status report prior to reassignment, and (4) attendance at a scheduled meeting (on December 14, 2000), return of his office to its original condition, and proper disposal of seized evidence.[26] This letter informed Deputy LaFrance that he would be interviewed on January 3, 2001, in Chief Davis's office, at which time he would be given an opportunity to contest the listed violations.

Deputy LaFrance submitted a written response disputing the charges contained in Lieutenant Harris's letter of December 27, 2000.[27] Chief Davis reviewed the investigation and Deputy LaFrance's response, and in a memorandum dated January 30, 2001, he informed the Deputy that he had concluded there was just cause to impose a two-day suspension without pay, noting that Deputy LaFrance had chosen not to attend a pre-disciplinary meeting on January 18, 2001.[28] If Deputy LaFrance had attended the pre-disciplinary meeting, it should have been obvious that he was not capable of performing his job.

On January 16, 2001, Deputy LaFrance was relieved of his patrol duties to allow him time to organize and turn in his cases. On that day, he worked swing shift, and at the beginning of his shift he retrieved his files from the Property Room. Deputy LaFrance gave several completed case files to Detective Phil Doremus and put the uncompleted case files and materials

[25] Exhibit E-15.
[26] Exhibit E-16.
[27] Exhibit E-16.
[28] Exhibit E-17.

into the trunk of his patrol car. On January 17, he sent e-mail to Chief Davis informing him of the status of his efforts and noting that he had retained some cases for additional work.

On January 30, 2001, Lieutenant Harris sent Deputy LaFrance a memorandum indicating that it had been determined he was still in possession of the Matthew Carter case file and materials, and instructing him to immediately surrender all case files and related materials that he still had in his possession. He was given release time on that day to do so, and was instructed to immediately refrain from conducting any further work on any case he had been involved in during his assignment to the Detectives Division. The memorandum informed him that failure to comply with these orders would result in further discipline.[29] This memorandum was delivered to Deputy LaFrance on January 30, 2001 by Sergeant Craig Montgomery, his immediate supervisor in the Patrol Division, as documented in e-mail to Undersheriff Dennis Bonneville.[30]

On January 30, 2001, Lieutenant Harris wrote a memorandum to be placed in Deputy LaFrance's file in which he outlined issues pertaining to deficiencies in Deputy LaFrance's handling of the Matthew Carter case (CR0012753) and case materials, and in other cases turned in by Deputy LaFrance, noting that the Deputy had only turned in three (3) of eight (8) outstanding cases still in his possession.[31] Lieutenant Harris indicated in this memorandum that he would be forwarding this account regarding violation of a direct order (to return all case files and materials) through the chain of command to request another internal investigation. He also indicated he would recommend an audit of all of Deputy LaFrance's cases and any property handled or seized by him in the course of investigating those cases. Other problems noted by Lieutenant Harris in this memorandum included Deputy LaFrance's failure to enter cases into the case-tracking system, failure to forward reports to records, and failure to prepare a status sheet

[29] Exhibit E-19.
[30] Exhibit E-20.
[31] Exhibit E-21.

for each file to assist in reassignment as had been requested of him on December 1, 2000.

Also on January 30, 2001, Sergeant Ned Newlin filed a complaint about Deputy LaFrance's failure to secure a Glock 23 pistol that had been issued to him. During the annual equipment audit, Sergeant Newlin, who was the supervising officer, and Harry Birkenfeld had attempted to account for the pistol. Sergeant Newlin eventually located the gun in the lab closet of the Detectives Division. Detective Dillard, who found it in an unlocked desk drawer in Deputy LaFrance's office, had placed the gun in the closet.[32] Harry Birkenfeld had e-mailed Deputy LaFrance on that day inquiring as to the status of the Glock, and Deputy LaFrance had indicated by return e-mail that he had previously turned in the weapon.

On February 5, 2001, Lieutenant Harris sent Deputy LaFrance a memorandum again ordering him to submit properly completed overtime slips for all work outside his regular shift. He was given until February 13 to do so, with the proviso that failure to do so would result in disciplinary action up to and including suspension or termination.[33]

Additional problems with Deputy LaFrance's handling of cases, property and evidence were discovered in the course of the investigation, and Lieutenant Harris documented these problems with notes to the internal file in the form of memoranda. On February 6, 2001, Lieutenant Harris documented problems with the Shortridge case (CR0011426).[34] Lieutenant Harris learned that despite having a video showing the suspects committing the burglary, and the victim's ability to identify some of the suspects, no complaint had been forwarded to the Prosecutor's Office for charging. Trina Washburn had received numerous telephone calls from the victim, Laurie Shortridge, asking about the status of the case and indicating that Deputy LaFrance had not returned her calls, although the Deputy had assured Ms. Washburn that he had

[32] Exhibit E-22.
[33] Exhibit E-24.
[34] Exhibit E-25.

done so. On February 6, Lieutenant Harris also wrote a separate memorandum documenting problems with case CR9923340.[35]

On February 13, 2001, Detectives Dillard and McDonough met with Deputy LaFrance to obtain information about the Shortridge burglary and the Ruth Davidson homicide. Deputy LaFrance provided them with information as to the latter case, but indicated to them that he had yet to do his report on the Shortridge case. Sergeant Merrill had been requested by Lieutenant Harris to complete a report on the Shortridge case, and he subsequently accompanied Deputy LaFrance to his car where the latter retrieved the Shortridge file from the trunk. Sergeant Merrill informed Lieutenant Harris that he had noticed approximately half a dozen additional manila folders in a box in the trunk, and the Lieutenant instructed him to prepare written documentation of his conversation with Deputy LaFrance, which he did in the form of a memorandum to Patrol Division Chief Wayne Gulla.[36]

On February 14, 2001, Lieutenant Harris instructed Sergeant Merrill to arrange to meet with Deputy LaFrance, remove all KCSO materials from the trunk of his car, and prepare an inventory of the materials retrieved. On that same day, Lieutenant Harris sent a memorandum to Sergeant Dave White outlining these events.[37]

Sergeant Merrill followed the Lieutenant's instructions and met with Deputy LaFrance on February 14 to retrieve the cardboard box from the latter's trunk. Sergeant Merrill also recovered a black, computer-type soft-sided bag containing a laptop computer that Deputy LaFrance indicated needed to be returned to Harry Birkenfeld. In response to questioning, Deputy LaFrance informed Sergeant Merrill that he had no further materials, although Sergeant Merrill observed additional materials in the trunk that looked as though they might be KCSO

[35] Exhibit E-26.
[36] Exhibit E-30.
[37] Exhibit E-28.

case files, materials and property. Sergeant Merrill did not ask about or look through these other items at that time, but rather relieved the Deputy from patrol detail and sent him home to retrieve any case-related material he might have there. Deputy LaFrance was instructed to meet Sergeant Merrill at the Park & Ride later that afternoon to turn over any additional materials he located at home. Subsequently Chief Gulla contacted Sergeant Merrill and instructed him to have Deputy LaFrance meet Sergeant Merrill, Sergeant Dave White and the Chief at the Silverdale precinct so that they could give him a letter and check his patrol car for additional materials needing to be returned to the Detectives Division.

Sergeant Merrill contacted Deputy LaFrance and instructed him to meet him at the Silverdale Precinct rather than the Park & Ride. During that conversation Deputy LaFrance informed Sergeant Merrill that he had found the Pyramid case in his trunk and indicated he would be returning those files.

Prior to Deputy LaFrance's arrival at the Silverdale Precinct, Sergeant Merrill, Sergeant White, and Chief Gulla inventoried the items that Sergeant Merrill had retrieved from the Deputy earlier that day. Deputy LaFrance arrived with several boxes he described as evidence belonging to Doug Lent Industries that had been at his home, and a manila folder containing the case report for the Shortridge case, which he had prepared the night before at Sergeant Merrill's request. In response to Sergeant Merrill's query as to whether that was everything he had, Deputy LaFrance initially said yes, but then indicated that the case file for the Pyramid case was still in his vehicle. Sergeant Merrill instructed the Deputy to move his patrol vehicle to the north side of the building. Once the vehicle was moved, Chief Gulla, Sergeant Merrill, and Deputy LaFrance witnessed as Sergeant White searched the Deputy's patrol vehicle. Among materials removed from the vehicle were a file size cardboard box containing the Pyramid case, a black soft-sided

bag containing 3.5 inch floppy disks and recordable CD-ROMs (some of the floppy disks had "KCSO" written on the labels and at least two of the CD-ROMs had writing on them indicating they belonged to Seattle Police Department), what was apparently case file paperwork, and several VHS video cassettes (including a commercially produced pornographic video).

After Sergeant White took possession of all this material, Chief Gulla and Sergeant Merrill assisted him in carrying it to Chief Gulla's office. Once there, Deputy LaFrance, Chief Gulla, and Sergeant Merrill witnessed as Sergeant White inventoried all items removed from the Deputy's patrol car. Sergeant White packaged all the items into boxes or brown paper bags and sealed them. The material was then taken to the Property Room, inventoried, and logged into a property report.

Deputy LaFrance was also presented with a letter dated February 14, 2001, informing him that the Office of Professional Standards was undertaking an investigation in response to a complaint that he had neglected his duties as a Deputy Sheriff. The letter indicated the allegations of the complaint included failure to respond to direct orders, neglect during criminal investigations, lack of competence, failure to complete and file reports, and improper evidence handling procedures, and contained a list of policies violated should the allegations be proven, with copies of the referenced policies attached.[38]

On February 15, 2001, Sergeant Merrill sent a memorandum to Chief Gulla detailing the occurrences of February 14.[39]

On February 15, 2001, Chief Mike Davis, on behalf of Sheriff Boyer, sent Deputy LaFrance a letter placing him on Administrative Leave effective immediately, pending

[38] Exhibit E-27.
[39] Exhibit E-31.

completion of the internal investigation.[40] That same day, Deputy LaFrance consulted a Guild attorney and sent an e-mail to Chief Gulla grieving all discipline he had received, including the suspension he had been notified of on January 30.[41] Undersheriff Bonneville reviewed the grievance, the investigation and the sanctions, and on February 27 sent Deputy LaFrance a memorandum denying what he categorized as a Step 3 Response, Grievance of Suspension, as untimely, and indicating that even had it been timely he would have denied the grievance on its merits.[42] It was the Undersheriff's contention that since Chief Davis, as the Sheriff's designee, did not receive the e-mail message until February 16, Deputy LaFrance did not file his grievance within the fifteen (15) calendar days required by the Agreement.

On February 20, 21, and 22, 2001, Sergeants White and Merrill opened the sealed boxes and bags, re-inventoried the materials, again logged them into a property report, and placed the materials into evidence bags which were sealed and initialed.

Detective James McDonough was directed to assist with reviewing cases that had been assigned to Deputy LaFrance. Detective McDonough reviewed thirty-three (33) cases that Deputy LaFrance had been involved in during his two years in the Detectives Division, and on March 13, 2001 he submitted a report of his investigation to Sergeant White.[43] Eleven (11) cases were closed and no further follow-up was needed, and four (4) cases were awaiting a charging decision or prosecution. Sixteen (16) cases required further follow-up and were reassigned to other detectives.

On April 25, 2001, Sergeant White, on behalf of Sheriff Boyer, sent a letter to Deputy LaFrance informing him that the Office of Professional Standards had expanded its investigation

[40] Exhibit E-54.
[41] Exhibit D-26.
[42] Exhibit E-18.
[43] Exhibit E-38.

to include allegations that he had misrepresented the status of several case files and the nature of several CD-ROMs and 3.5 floppy disks that were in his patrol car at the time it was searched and inventoried. It was also alleged that he had been absent from his duty station without authorization and made disparaging comments to, and hung up the telephone on, Sergeant White.[44]

An investigatory interview occurred on April 24, 2001, and Deputy LaFrance attended with Arthur Ortiz, Guild Attorney; Michael Rodrigue, Guild President; and Phil Doremus, Guild Representative. During this interview, the Deputy and the Guild requested clarification as to the allegations and more time to respond to the charges, to which the County agreed; the interview was tape-recorded and the tape was transcribed.[45] During this interview Deputy LaFrance's behavior (based on the transcript) appeared to be evasive, erratic and confused.

On April 30, 2001, Sergeant White sent a letter to Deputy LaFrance detailing the charges against him.[46]

Two additional investigatory interviews took place on May 7 and 10, 2001. Deputy LaFrance appeared for both interviews with the same representation as on April 24; both interviews were tape-recorded and transcribed.[47] Again, during these interviews Deputy LaFrance's behavior (based on the transcript) appeared to be evasive, erratic and confused.

Sergeant White subsequently investigated Deputy LaFrance's responses to the allegations and submitted an investigative summary of his findings to Chief Davis on August 2, 2001.[48] In addition, Lieutenant Harris reviewed the transcript of LaFrance's interviews, and prepared a

[44] Exhibit E-39.
[45] Exhibit E-40.
[46] Exhibit E-41.
[47] Exhibit E-42.
[48] Exhibit E-47.

written summary of his comments.[49]

As Chief of Detectives, Mike Davis was responsible for reviewing Sergeant White's internal investigation and determining whether the allegations against Deputy LaFrance were founded. On September 11, 2001, Chief Davis issued a Notice of Decision and Pre-termination hearing to Deputy LaFrance listing 29 sustained incidents of misconduct and their attendant policy violations.[50] Attached to this Notice was a Chronology of Progressive Discipline listing the counseling, warnings, and discipline that Deputy LaFrance had received.[51]

A *Loudermill* hearing lasting the better part of a day was held on November 13, 2001, at the Auditor's Office conference room in the Kitsap County Courthouse in Port Orchard. Deputy LaFrance attended and was again represented by Guild members Phil Doremus and Mike Rodrigue and by Guild Attorney Arthur Ortiz. The *Loudermill* hearing was tape-recorded and the tapes were transcribed.[52]

On November 29, 2001, Chief Davis sent Deputy LaFrance a Notice of Termination detailing the specific incidents and violations that were being sustained subsequent to the November 13 *Loudermill* hearing.[53] Examining the 29 incidents outlined in the September 11, 2001 Notice of decision and pre-termination hearing, Chief Davis determined that the majority of the allegations could be sustained. He grouped related incidents for purposes of clarity, and itemized the specific rule violations sustained with respect to the incidents, as follows:

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[49] Exhibit E-43.
[50] Exhibit E-48.
[51] Exhibit E-49.
[52] Exhibit E-50.
[53] Exhibit E-51.

Incidents:	As To:	Rule Violations Sustained:
1 and 2	Presha Case – seizure contrary to Department policy; failure to document case in records; documents and records not treated according to procedure	4.01.02(a)(3) 4.02.02(d) 6.01.03 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule
3	Failure to follow orders to turn in materials; failure to turn in overtime slips	4.01.02(a)(2) 4.01.03 11.3.01 – Civil Service Rule 11.3.02 – Civil Service Rule 11.3.08 – Civil Service Rule
4	Failure to request annual leave while on Administrative leave	UNSUSTAINED
5	Shortridge Burglary - failure to document investigative activity in report form	4.01.02(a)(3) 4.02.02(d) 6.01.03 11.3.01 – Civil Service Rule 11.3.02 – Civil Service Rule
6	Shortridge Burglary – failure to properly handle evidence	4.01.02(a)(2)-(3) 4.02.02(d) UNSUSTAINED 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 – Civil Service Rule
7 and 8	Shortridge Burglary – lack of candor	4.01.02(a)(3) 4.02.02(d) UNSUSTAINED 4.02.03(a) 6.01.03 UNSUSTAINED 6.01.07(e) UNSUSTAINED 11.3.01 - Civil Service Rule UNSUSTAINED 11.3.02 - Civil Service Rule 11.3.04 - Civil Service Rule
9 and 10	Fraud Case (99-06486) – failure to secure arrest warrant and failure to properly handle evidence	4.01.02(a)(2)-(4) 4.02.02(d) 6.01.03 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule
11	Duplicate of 10	DELETED

Incidents:	As To:	Rule Violations Sustained:
12 and 13	Pyramid Case – failure to properly handle evidence, failure to file charges, misrepresentation	4.01.02(a)(2)-(4) 4.02.03(a) 6.01.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.04 - Civil Service Rule
14	60 computer discs and 3 CD-ROMs containing pornography and child pornography found in Deputy's patrol vehicle trunk	4.01.02(a)(3) 4.02.03(a) 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.04 - Civil Service Rule
15	Unsecured handgun	3.05.02(f) 4.01.02(a)(2)-(3) 4.02.03(a) 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.04 - Civil Service Rule
16 and 17	Discourteous behavior to Sergeant White	4.02.03(a) UNSUSTAINED 11.3.02 UNSUSTAINED 11.3.04 UNSUSTAINED
18	McKush Theft (99-023340) – failure to complete reports	4.01.02(a)(2)-(3) 4.02.02 6.01.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule
19	Child Molestation Case (00-10607) – delay in completion of reports and paperwork	4.01.02(a)(2)-(3) 4.02.02(d) 6.01.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule
20	Duplicate of 14	DELETED
21	Carter Child Pornography Case (00-12753) – failure to file case with Federal prosecutors after advising DPA Tim Drury to drop State charges	4.01.02(a)(2)-(3) 4.02.02(d) 6.01.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule

Incidents:	As To:	Rule Violations Sustained:
22	Richards Arrest (00-04855) – failure to return personal property to arrestee or to admit said property into evidence prior to location of arrestee	4.01.02(a)(2)-(3) 4.02.02(d) 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule
23	Doug Lent Industries Embezzlement Case (99-10856) – failure to properly handle evidence and paperwork	4.01.02(a)(2)-(3) 4.02.02(d) 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule
24	DeGuzman Child Molestation Case (00-13417) – downloading of pornographic images onto County computer and transfer of images to desktop computer at KCSO Silverdale office	4.01.02(a)(2)-(3) 4.02.02(d) 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule
25	Failure to appropriately deal with ammunition recovered from Central Kitsap school authorities	4.01.02(a)(2)-(3) UNSUSTAINED 4.02.02(d) UNSUSTAINED 6.01.03 UNSUSTAINED 6.01.07(e) UNSUSTAINED 6.03.03 UNSUSTAINED 11.3.01 - Civil Service Rule UNSUSTAINED 11.3.02 - Civil Service Rule UNSUSTAINED 11.3.10 - Civil Service Rule UNSUSTAINED
26	Child Molestation Case (99-11902) – mishandling of photo evidence and original reports from Washington State Patrol	4.01.02(a)(2)-(3) 4.02.02(d) 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule
27	Theft Case (00-01666) – failure to follow up on attempt to locate suspect, mishandling of evidence and failure to forward follow-up reports to records	4.01.02(a)(2)-(3) 4.02.02(d) 6.01.07(e) 6.03.03 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule

Incidents:	As To:	Rule Violations Sustained:
28 and 29	Child Pornography Case (00-13102) – failure to submit case to Prosecutor's Office, evidence (pornographic VHS tape) found in Deputy's patrol vehicle trunk	4.01.02(a)(2)-(3) 4.02.02(d) 6.03.03 6.01.07(e) 6.03.15 11.3.01 - Civil Service Rule 11.3.02 - Civil Service Rule 11.3.10 - Civil Service Rule

On January 10, 2002, Guild President Detective Rodrigue filed a grievance challenging Deputy LaFrance's termination, contending that the termination was not supported by just cause, in violation of Article I, Section 1, of the Agreement, and requesting that Deputy LaFrance be reinstated with full back pay and benefits.[54] On January 31, 2002, Undersheriff Dennis Bonneville wrote to Guild President Detective Rodrigue denying the grievance.[55]

In accordance with the terms of the Collective Bargaining Agreement, the Kitsap County Deputy Sheriff's Guild requested that Deputy LaFrance's grievance of his termination be submitted to the American Arbitration Association for arbitration. David Gaba was selected as arbitrator, and the hearing was conducted on January 21-23, 2004; January 26-27, 2004; February 23-24, 2004; March 11-12, 2004; March 31, 2004; and April 1, 2004, in a variety of locations in the city of Port Orchard, Washington.

V. POSITION OF THE GUILD

The Guild summarizes its case as hinging on four elements with reference to the establishment of just cause: (1) violation by the County of due process and of the Collective Bargaining Agreement, (2) victimization and undue criticism of Deputy LaFrance by Lieutenant Harris, (3) failure on the part of the County to "diagnose, understand, treat and accommodate"

[54] Exhibit E-52.
[55] Exhibit E-53.

the Deputy's job-related health conditions, and (4) denial of any rule violations on the part of the Deputy, "except where such rule violations can be reasonably excused."[56] The Guild has provided two appendices to its brief, an Analysis of Incidents and an Analysis of Specific Allegations, to describe and contest what it characterizes as "a sea of charges."[57]

The Guild discusses Arbitrator Carroll Daugherty's widely accepted formulation of the seven (7) elements of just cause, contending that there are at least 19 factors that can be identified as germane to the establishment of just cause, and that there are 14 factors that are directly relevant to the case at hand, as follows:

1. Did KCSO give Deputy LaFrance reasonable notice of the penalty he faced for violating the rules in question?
2. Did KCSO conduct a thorough and fair investigation, and consider all of the relevant evidence?
3. Did the investigation of Deputy LaFrance comply with all legal and contractual due process requirements?
4. Did Deputy LaFrance in fact violate the KCSO rules that were identified?
5. Was the penalty imposed by KCSO consistent with its treatment of other employees?
6. Did Deputy LaFrance receive progressive discipline when appropriate?
7. Does KCSO have a strong, legitimate interest in the enforcement of the rules it used to discipline Deputy LaFrance?
8. Is the penalty imposed by KCSO reasonable in light of the nature of the offense, Deputy LaFrance's length of service, and his discipline record, particularly in the patrol division?
9. Was the penalty reasonable in light of all the other mitigating factors?

[56] Grievant's Closing Brief, p. 5.
[57] Grievant's Closing Brief, p. 5.

10. Was the discipline imposed by KCSO the only disciplinary action taken concerning the alleged conduct?

11. Did KCSO avoid contributing in any way to Deputy LaFrance's conduct through its own action or lack of action?

12. Was KCSO's own motivation and reasoning process in making the discipline decision proper?

13. Did KCSO fulfill all of its own legal obligations to accommodate Deputy LaFrance?

14. Did the discipline of Deputy LaFrance comply with all of his legal or constitutional rights?[58]

The burden of proof for the County espoused by the Guild is one of clear, cogent and convincing evidence. The Guild places great emphasis on the length of Deputy LaFrance's service and the catastrophic impact his termination, if upheld, will have on his future career, contending that because of the severity of the repercussions from this decision, a preponderance of the evidence standard is not sufficient. The Guild bolsters its argument by referencing the Washington State Supreme Court which held that a physician's due process rights were violated by the application of a preponderance standard, with the Guild maintaining that the interests at stake in grievances for law enforcement officers are analogous to those for physicians.[59] The Guild contends that the County erred in its discipline and investigation of the Deputy by applying the lesser and insufficient burden of preponderance, and contends that an application of the clear, cogent and convincing standard would not have resulted in the Deputy's discharge.

Even assuming some level of wrongdoing is acknowledged, and some discipline of Deputy LaFrance is therefore warranted, the Guild is emphatic in its contention that discharge is unwarranted.

The Guild contends that Deputy LaFrance was a superior officer for most of his career,

[58] Grievant's Closing Brief, p. 7-8.
[59] 144 Wn.2d 516, 29 P.3d 689 (2001).

and that his termination resulted from two primary causative factors: (1) an unacknowledged medical impairment; and (2) Lieutenant Harris having pursued a calculated course of attempting to discredit him. The Guild maintains that Lieutenant Harris targeted Deputy LaFrance because he took exception to the Deputy's investigation of Roxanne's, a prostitution house, owing to the Lieutenant's acknowledged intimate relationship with Stevie Collins, who in turn had a relationship with that establishment.

It is argued by the Guild that Deputy LaFrance's judgment became seriously impaired as a consequence of a severe psychological problem that should have been obvious to KCSO. The Deputy's repeated failure to follow orders is, in the Guild's view, clearly a consequence of impairment and in no way can be categorized as willful misconduct. Further, the Guild contends that the Deputy was not given reasonable notice of penalty. It is also argued that he was not accorded a prompt, thorough and fair investigation, but rather than the investigation was not impartial, in that positive elements of the Deputy's career were not given due weight, and that the investigation involved unreasonable delays and violated due process, the latter because the allegations as presented in the pre-discipline notice were expanded by Chief Davis in the discipline notice.

It is the Guild's position that Deputy LaFrance did not violate the identified rules. The Guild notes, with respect to his charged violation of the January 30, 2001 order to return his case files, that the County had had complete and exclusive control of those files when it cleaned his office on December 15, 2000, but chose to return those files to him for additional work.

Returning to its contention that the Deputy did not willfully disobey orders, the Guild expands its case to discuss the distinction between lying and unintentional misstatement of facts,

and the fact that "a failure to respond it not always insubordination."[60]

The Guild maintains that Deputy LaFrance's punishment was not in line with that accorded to other employees with similar violations, citing a deputy, Chris Andrews, who received only a verbal reprimand for not telling the truth, and noting that in another KCSO case where an officer was terminated there were a number of additional serious charges over and above that of untruthfulness.[61]

With respect to the issue of whether Deputy LaFrance was accorded a clear course of progressive discipline, the Guild argues that this was not the case, and also argues that some of the rule violations alleged against the Deputy pertain to rules for which the County has not documented a strong, legitimate interest in enforcement. While conceding that rules against untruthfulness and insubordination are critical to law enforcement, the Guild notes that other rules cited by the County with respect to Deputy LaFrance are often breached without consequent discipline, naming rules pertaining to the completion of written consent forms prior to search, the treatment of all materials as evidence, the completion of written reports for every case-related contact, the handling of closed case files as evidence, the processing of property, and proper charging of overtime in its argument for this point. The Guild contends that Deputy LaFrance was unfairly and inconsistently penalized for behaviors that seldom even lead to discipline, much less discharge. Therefore, the Guild reiterates its position that nothing the Deputy did justifies his termination and that the discipline imposed was excessive, especially in light of his overall employment record and the mitigating factors of his medical impairment and the failure of KCSO to provide him with adequate training and support.

The issue of double jeopardy is given substantial weight by the Guild, in that it contends

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[60] Grievant's Closing Brief, p. 45.
[61] *In the Matter of an Arbitration Between Kitsap County Deputy Sheriff's Guild and Kitsap County,* Arbitrator's Decision and Award, Craig Montgomery Termination, Case No. 75 L 390 00240 02 (June 23, 2003).

that the Deputy had already been disciplined, by a two-day suspension in late January and early February of 2001, for the same acts that were used to justify his termination.

The Guild revisits and emphasizes its earlier arguments with regard to the improper motives of the KCSO in its decision to terminate the Deputy's employment, its failure to accommodate his medical impairment, and its violation of the Deputy's legal rights with respect to due process in terms of privacy and of search and seizure, inability to assist in his defense at the *Loudermill* hearing owing to impairment, and wrongful publishing of facts which deprived him of his liberty interests (with reference to allowing rumors of the child pornography component of the investigation).

The County is contended to have failed in its establishment of the elements of just cause, and the Guild asks that Deputy LaFrance be made whole with reinstatement, back pay and benefits, expunging of personnel files, a name-clearing press release, and reimbursement for a substantial portion of attorney fees, including all fees incurred up to the point of arbitration.

VI. POSITION OF THE EMPLOYER

It is the position of Kitsap County that it has met its evidentiary standard for just cause to terminate Deputy Brian LaFrance, namely that it has established its case by a preponderance of the evidence that it concludes is the appropriate burden of proof in response to an employee grieving discharge.[62] The County contends that it has proven Deputy LaFrance guilty of numerous incidents of several types of misconduct, and that termination is therefore a reasonable penalty. Primary to the County's case are what it characterizes as Deputy LaFrance's failure to obey the January 30, 2001 order that he turn in his case files, his failure to obey the February 5, 2002 order that he turn in overtime slips for all overtime he had worked, his demonstrated

[62] Post-Hearing Brief of Kitsap County.

incompetence in filing reports and cases, and his incompetence in handling evidence and property.

With reference to what is described as Deputy LaFrance's lack of candor, the County discusses his initial denial that he received the January 30, 2001 order to turn in his cases and maintains that in hearing testimony he gave "dodging, equivocal and double-tongued responses to questions about case reports, files, property and evidence."[63] The County discusses Deputy LaFrance's testimony about downloading files onto the squad room computer, asserting that his hearing responses were evasive and suspicious with regard to this episode and misrepresented images of child pornography as miscellaneous documents. The County goes on to discuss Deputy LaFrance's representation to Sergeant Merrill that he had submitted the completed Shortridge Burglary report to Trina Washburn, which she denied; his contention that he was advised by John Dolese of the Prosecutor's Office not to submit the Pyramid Case to that Office for charging, due to pending litigation, which advice Mr. Dolese denied having given; his contention to Harry Birkenfeld that he had turned in the Glock 23 handgun when in fact he had left it in his unlocked desk drawer (where it had been found by Detective Dillard, who had relocated it to the lab closet of the Detectives Division) and the varied and inconsistent testimony about the disposition of the handgun that he provided in hearing testimony; his initial denial and subsequent acknowledgement that he had stored materials for the Doug Lent case in his home; his varied descriptions of the contents of the floppy discs and CD-ROMs in his trunk that were determined to contain pornographic images, including child pornography; and his misrepresentation to Sergeant Porter of the nature of the materials in his trunk, with respect to their being personal materials as opposed to KCSO materials.

Discussing the central principle of employee progressive discipline to the establishment

[63] Post-Hearing Brief of Kitsap County, p. 62.

of just cause, the County asserts that Deputy LaFrance was provided with ongoing documentation of his deficiencies and was afforded multiple opportunities to amend his behaviors, noting that the Collective Bargaining Agreement mandates that written reprimands and suspension without pay constitute incidences of progressive discipline. The County maintains that the only discipline that was formally grieved by Deputy LaFrance, prior to the termination itself, was the two-day suspension, and further notes that the grievance was denied and not advanced to arbitration. The County insists that the pattern of misconduct that had been the focus of prior discipline was similar to the behavior that resulted in his termination.

The County categorizes the investigation against Deputy LaFrance as full and fair, in that there were three investigatory interviews and a *Loudermill* hearing. The County disputes Deputy LaFrance's argument that improper acts by Lieutenant Harris were a significant component in the progressive discipline and resulting termination, denying any conspiracy against the Deputy on the part of the Lieutenant and pointing out that other County representatives were aware of the Deputy's deficiencies and involved in the discipline and investigation that resulted in his termination, and noting that the final termination decision was made by Chief Davis and supported by Undersheriff Bonneville. The County takes due note of Lieutenant Harris's misconduct subsequent to the Deputy's termination, but contends that this misconduct is not relevant to the discipline or discharge of the Deputy.

Turning to the argument that the Detectives Division did not provide Deputy LaFrance with adequate training and equipment, the County discusses contrary testimony by the Deputy himself at an investigative interview on May 10, 2001, and documents that he had access to adequate technical equipment to do his job, while also pointing out that "obeying direct orders, preparing and filing reports and cases, and handling evidence and property" do not require either

high-tech computers or software.[64]

The County is emphatic in its belief that the Guild has not provided any justification for a reduction in penalty, citing arbitration decisions supporting the argument that in cases of proven misconduct arbitrators do not have discretion to amend a management penalty absent documentation of management abuse of discretion. The County is also emphatic in its argument that any health problems Deputy LaFrance might have been experiencing during the course of the progressive discipline are not grounds for mitigation, in that it takes exception to the Deputy denying misconduct and incompetence while he is simultaneously contending that his misconduct and incompetence occurred consequent to health issues; points out that the only medical testimony presented was garnered after the fact; and finally contends that disability is not grounds for insulation from the consequences of bad acts, noting that the Equal Employment Opportunity Commission acknowledges that reasonable accommodation does not include "[w]aiving warranted discipline, even if disability played a role in causing the conduct that is worthy of discipline."[65] The County points out that neither a heart condition nor post-traumatic stress disorder resulting from exposure to child pornography were at issue prior to the arbitration hearing.

Finally, the County renews its argument that Deputy LaFrance's willful disobedience of reasonable orders and directives led to his progressive discipline and, when that failed, termination, and reiterates its contention that there was just cause for his termination.

[64] Post-Hearing Brief of Kitsap County, p 76.
[65] EEOC ADA Case Study Training (1996), C.S.1 at p. 5.

VII. DECISION

The Applicable Standard is Just Cause.

Where there is no contractual definition, it is reasonably implied that parties intended application of the generally accepted interpretation which has evolved in labor-management jurisprudence: that the "just cause" standard is a broad and elastic concept, involving a balance of interests and notions of fundamental fairness.[66]

Described in very general terms, the applicable standard is one of reasonableness:

> ...whether a reasonable (person) taking into account all relevant circumstances would find sufficient justification in the conduct of the employee to warrant discharge (or discipline.)[67]

As traditionally applied in labor arbitrations, the just cause standard of review requires consideration of whether an accused employee is in fact guilty of misconduct. An employer's good faith but mistaken belief that misconduct occurred will not suffice to sustain disciplinary action. If misconduct is proven, another consideration, unless contractually precluded, is whether the severity of disciplinary action is reasonably related to the seriousness of the proven offense and the employee's prior record. It is by now axiomatic that the burden of proof on both issues resides with the employer.

The "Just Cause" standard as seminally defined by Arbitrator Carroll Daugherty incorporates seven tests as follows:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

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[66] *Mission Foods* 118 LA 1608, *Rabanco Recycling* 118 LA 1411.
[67] *RCA Communications, Inc.* 29 LA 567, 571 (Harris, 1961). See also *Riley Stoker Corp.*, 7 LA 764, 767 (Platt, 1947).

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the company's investigation conducted fairly and objectively?

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of the employee in his service with the company?[68]

If one or more of these questions is answered in the negative, then normally the just cause requirement has not been satisfied.[69]

I find that the list as defined by Arbitrator Daugherty provides a sufficient level of detail to satisfactorily determine whether Deputy LaFrance's rights were protected.

The Applicable Burden of Proof is Clear and Convincing Evidence.

In a case involving the discharge of an employee, the burden is on the employer to sustain its allegations, and to establish that there was just cause for the termination. As the leading treatise in the area noted:

> Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority and other contractual benefits, and reputation are at stake. Because of the seriousness of the penalty, the burden generally is held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires "just cause" for discharge.[70]

In this context, it is appropriate for the Arbitrator to demand clear and convincing evidence. As Arbitrator Richman explained:

> The imposition of a lesser burden than clear and convincing proof fails to give

[68] *Enterprise Wire Co.*, 46 LA 359, 363-4 (1966).
[69] *Enterprise Wire Co.*, 46 LA 359, 362 (1966).
[70] Elkouri and Elkouri, *How Arbitration Works* 905 (5th Ed. 1987).

consideration to the harsh effect of summary discharge upon the employee in terms of future employment.[71]

Only if misconduct in the instance that led to the termination is proven can an arbitrator go on to address the question of appropriateness of disciplinary action.

The County argues for a standard of preponderance of the evidence, in contrast to the Guild's advocacy for a standard of clear, cogent and convincing evidence. The Guild is correct in its arguments, given the seriousness of the penalty of termination, the result of which is that Deputy LaFrance will be unable to find future work in the law enforcement field should the termination be upheld.

Was the Just Cause Standard Met?

On initial examination this case would seem to have a significant level of complexity, but this perception is more a result of the large volume of incidents and their corollary rule violations (aptly described by the Guild as "a sea of charges") than of any inherent complexity with respect to the fundamental issues. Deputy LaFrance's alleged transgressions have several common themes and, once commonalities are addressed, the issues can be reduced to a relatively abbreviated list. The Guild would have us believe that the sheer volume of charges is testament to the unjust nature of Deputy LaFrance's treatment, whereas the County takes the position that the abundance of alleged incidents points to an unequivocal diagnosis of misconduct on the part of the Deputy. In actuality, the charges have significant commonalities. First, though, it is necessary to deal with the issue of whether the County met the tests for just cause.

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[71] *General Telephone Co. of California*, 73 LA 531, 533 (Richman, 1979). See also: *Atlantic Southeast Airlines, Inc.*, 101 LA 515 (Nolan, 1993) (using clear and convincing standard); *J. R. Simplot Co.*, 103 LA 865 (Tilbury, 1994) (same); *Collins Food International, Inc.*, 77 LA 483, 484-485 (Richman, 1981) (same). The Employer bears this burden of proof both with respect to proving the alleged violation, and with respect to demonstrating the appropriateness of the penalty. *Pepsi-Cola Co.*, 104 LA 1141 (Hockenberry, 1995).

As to the first element of just cause, the issue of whether Deputy LaFrance was given forewarning or foreknowledge of possible or probable disciplinary consequences of his conduct, I find that the County met its burden of proof. Reviewing the series of disciplinary events beginning in December of 1999, and culminating in his termination, I find the County did on numerous occasions inform the Deputy that failure to improve his behavior could result in various disciplinary consequences, which were clearly delineated.

With respect to the second element of just cause, whether the rules and orders in question relate to the orderly, efficient, and safe operation of KCSO, and to a reasonable expectation of performance on the part of the Deputy; I again find that the County has met its burden of proof. The rules pertaining to competency; neglect of duty; compliance with orders; timely and accurate submission of reports; correct property report forms procedure; and inventory of records, reports, property and evidence are necessary to the operation of the Sheriff's Office. So, too, are the cited Civil Service Rules from Section 11.3 (Discipline—Good Cause—Illustrated) which pertain, respectively, to: (11.3.01) incompetency, inefficiency, inattention to, or dereliction of duty; (11.3.02) dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow employee, any other act of omission or commission tending to injure the public service, or any other willful failure on the part of the employee to properly conduct himself; (11.3.04) dishonest, disgraceful, or prejudicial conduct; (11.3.08) willful or intentional violation of any lawful and reasonable regulation, order or direction made or given by a superior officer; and (11.3.10) violation of reasonable requirements promulgated by the Sheriff's Written Rules.[72] None of these rules is unreasonable, nor is unreasonable that an employee be expected to follow these rules.

Turning to the third element of just cause, namely whether the County made an effort to

[72] Exhibit E-3.

establish whether violations had in fact occurred before disciplining Deputy LaFrance, I find that the burden of proof for just cause has been met. In no instance was discipline imposed by the County until and unless it was satisfied that there were documented violations of rules on the part of Deputy LaFrance. Indeed, I would consider that the County was extremely generous in its continued efforts to work with the Deputy to remedy his unsatisfactory behaviors. The County in its brief takes exception to the Deputy denying misconduct and incompetence while he is simultaneously contending that his misconduct and incompetence occurred consequent to health issues. The County is correct that the vast weight of evidence showed Deputy Lafrance to be guilty of both misconduct and incompetence.

The County also met the fourth element of just cause, the fairness of the investigation. Deputy LaFrance was interviewed extensively on April 24, 2001, and again on May 7 and May 10. Sergeant White conducted a thorough investigation, and Lieutenant Harris reviewed the transcripts of the Deputy's interviews and prepared a written response. The Notice of Decision and Pre-termination hearing provided to Deputy LaFrance by Chief Davis on September 11, 2001 listed 29 sustained incidents of misconduct and attendant policy violations, including a Chronology of Progressive Discipline listing the counseling, warnings, and discipline that Deputy LaFrance had received. A *Loudermill* hearing was held on November 13. Subsequent to that hearing the Chief revised his evaluation and provided the Deputy with an exhaustively detailed Notice of Termination detailing what charges were being sustained and why he was sustaining them.

The County met element five, the provision of substantial evidence or proof that Deputy LaFrance was guilty as charged. The investigation, as already noted, was thorough and comprehensive, and the documentation provided in the Notice of Termination puts to rest any

idea that the sustenance of charges by Chief Davis was in any way arbitrary or capricious.

The sixth element for just cause was also met. The Guild argues that the termination of Deputy LaFrance was discriminatory in nature in that there was no corollary case of dismissal for similar charges. It is true that Deputy Chris Andrews received only a verbal reprimand for not telling the truth, but the volume of offenses committed by Deputy LaFrance do not merely involve untruth; that volume justifies, and indeed calls for, a different magnitude of punishment. The Guild also cited the termination of Deputy Craig Montgomery, pointing out that Deputy Montgomery had been guilty of a number of offenses in addition to mere untruthfulness. I served as Arbitrator for the Montgomery arbitration, and I must note at this point that Deputy LaFrance was guilty of much more than a few isolated episodes of untruthfulness. His violations were different in nature from those of Deputy Montgomery, but that does not mean they did not warrant serious consideration and penalty.

Finally, we arrive at the seventh and final element of just cause, namely whether the degree of discipline administered was reasonably related to the seriousness of the proven offenses, and here this case becomes very complex indeed. Termination is an extreme remedy, though the County exhausted all available alternate and lesser remedies in the service of improving the Deputy's behavior before resorting to this extremity. It is true that Deputy LaFrance had positive work history prior to the deterioration of his performance, but that history is not sufficient grounds for the County to maintain his employment in the face of his more recent and thoroughly bizarre behavior. The Guild argues that Deputy LaFrance is entitled to some degree of mitigation due to the conspiracy that was waged against him by Lieutenant Harris, as well as the mental and physical impairments he was suffering from at his time of discharge. Each of these arguments is discussed below.

Was There a Conspiracy?

Central to the testimony of Deputy LaFrance and the Guild's argument was the belief in a conspiracy to terminate Deputy LaFrance due to his investigations into Lieutenant Harris's relationship with "Roxanne's," which, for purposes of argument, I assume to be a front for prostitution activities. At various times Deputy LaFrance indicated that Lieutenant Harris, Lieutenant White, Chief Davis, and Undersheriff Bonneville and others were engaged in a wide-ranging attempt to discredit him and remove him from his position in the Kitsap County Sheriffs Office. Deputy LaFrance clearly believed that this wide-ranging conspiracy was due to his investigations into Roxanne's, as well as his work in the field of child pornography. However, the record contains no instances of Lieutenant White, Chief Davis, and Undersheriff Bonneville being anything but hard working public officials concerned only with the public good. Chief Davis in particular showed a great deal of empathy for Deputy LaFrance, and the Chief's approach to the entire matter was characterized by compassion and restraint.

More problematic is the testimony concerning Lieutenant Harris, who subsequently resigned from the KCSO while he was being investigated for selling stolen property. Harris did have a relationship with one of "Roxanne's" associates, and there was ample testimony that he did not like Deputy LaFrance. While much of Deputy LaFrance's "conspiracy theory" is fanciful (i.e., that the computer-illiterate Harris managed to plant pornographic images among Deputy LaFrance's backed up computer files), I do believe some of its elements to be true. Specifically, I believe that a record supports a finding that:

1. Harris did not like Deputy LaFrance,
2. Harris punished officers by assigning them extra work,

3. Harris assigned more cases to LaFrance than to certain other deputies,

4. Harris never adequately trained Deputy LaFrance in his Detective duties,

5. Harris removed the "Roxanne's" file from the KCSO property room in January of 2001,

6. Harris suffered from an extremely poor memory, and often could not remember cases that he had assigned to his Deputies,

7. Harris had little understanding of the actual caseload being managed by any of the Detectives,

8. Harris failed to recognize Deputy LaFrance's strange behavior as a sign of mental and physical impairment.

The record is clear that Harris did not like Deputy LaFrance; however, one would think that Harris would have been ecstatic to have LaFrance out of his Division and that had no apparent reason to seek LaFrance's termination. Lieutenant Harris was a poor police officer and a sub-standard supervisor; however, Deputy LaFrance was not the victim of a conspiracy, but was terminated due to his inability to perform his job and his bizarre behavior.

Should the Discharge be Modified Due to LaFrance's Disabilities?

At the hearing the Guild called Antone Pryor, Ph.D., a psychologist, to testify concerning LaFrance's mental health conditions and how they may have caused his misconduct. Dr. Pryor, who is not a medical doctor, testified as to Deputy LaFrance's mental and physical impairments at the time of his discharge. The County on cross-examination demonstrated that Dr. Pryor did not receive a referral for Deputy LaFrance until June 2003, and that the only

medical records Dr. Pryor reviewed were from the years 1983, 1986, and 1993 through 1995. Further, Dr. Pryor admitted that he knows of no treatment or evaluation of LaFrance between 1995 and 2001 when LaFrance was in Detectives and admitted that he did not review any documentation in connection with LaFrance's termination. The only information that Dr. Pryor relied on in his diagnosis was LaFrance's "subjective experience."

The parties agree that in early 2002, when the arbitration was first rescheduled, Deputy LaFrance had a heart attack that required surgery and the insertion of a stent in one of his arteries. This heart attack occurred almost eighteen months after Deputy LaFrance's suspension. The Employer correctly argues that disability laws do not support the Guild's request that the Arbitrator rescind the discipline as an accommodation for a health condition occurring well after the acts of misconduct themselves, and that if LaFrance wanted the County to take his health into consideration in responding to his misconduct, it was incumbent on LaFrance to disclose the health problems and seek accommodation. As stated by the Employer in its brief:

> The law is clear that an employer is not required to speculate as to the existence or extent of an employee's disability, or as to the employee's desire for an accommodation. *E.g., Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 450 (6th Cir. 1999). Rather, the burden is on the employee to disclose any disability that **is not obvious**, and to initiate communications with the employer regarding potential accommodations.[73]

There is no duty on an employer to attempt to discover health conditions that are not obvious. However, one must examine the facts in this case to determine whether the Employer knew or should have known of the employee's disabilities.[74] Should Lieutenant White, Chief Davis, and Undersheriff Bonneville have known of Deputy LaFrance's health conditions? Probably not; each of the individuals listed above had limited contact with the Grievant and only

[73] Emphasis added by the arbitrator.

[74] It should be noted that the normal burden of proof is inverted in this matter due to the nature of labor arbitrations. The employer has the burden to show by clear and convincing evidence that a reasonable employer would not have known of the employee's alleged disabilities. Had the burden been reversed my findings would have been different.

interacted with him in situations in which is behavior would normally appear odd due to the stressful nature of the proceeding (i.e., a *Loudermill* hearing or disciplinary interview).

More problematic is Lieutenant Harris, who was dealing with Deputy LaFrance on a daily basis for more than a year and was his immediate supervisor. In hindsight, anyone reviewing Deputy LaFrance's performance can see an individual suffering from some form of mental illness, or as the Guild attorney phrases it, "erratic and unusual conduct." Detective LaFrance's inability to follow through on simple orders is not an issue that first surfaced in December of 2000. The record is clear that at least as far back as the Spring of 2000, and perhaps far earlier, LaFrance was exhibiting bizarre work habits; his inability to get anything done, his paranoid view of his supervisors (although partially justified in the case of Harris), his feelings of persecution, his need to work extra hours off-the-clock, and his fixation on child pornography cases and his need to protect children were all either unusual behaviors or were distortions or exaggerations of otherwise normal behaviors. Yes, LaFrance engaged in serious acts of misconduct that warranted his discharge from employment as a deputy sheriff; however, almost any other supervisor in Kitsap County would have recognized the Grievant's mental health issues and referred him for a fitness-for-duty exam prior to January 2001. Lieutenant Harris, for whatever reason, seemed incapable of dealing with the Grievant and his issues.[75]

The County argues that an employee has a duty to request an accommodation and does not have the luxury of waiting to get fired and then requesting a second chance due to their undisclosed disability. Normally I would agree with the County and the cases its attorneys cited. However, I believe that the case at hand is distinguishable from cases cited by the Employer

[75] It is fair to note that reasonable minds could differ as to interpretation of Deputy LaFrance's behavior; for instance what the employer describes as the grievants "dodging, equivocal and double-tongued responses to questions about case reports, files, property and evidence" during the hearing could also be described as the wandering incoherent answers of an obviously ill ex-employee.

since those dealt with employees who knew of their own disabilities. I believe that the evidence as a whole indicates that Deputy LaFrance had no idea of the medical problems he was suffering from until well after his termination. In the instant case we have a disability that should have been apparent to his co-workers, yet due to the nature of the condition(s) is undetectable to the afflicted individual.[76] The Employer has failed to show by clear and convincing evidence that the penalty was appropriate for an employee who was clearly suffering from serious health problems.

Burden of Proof

Complicating this case is the issue of the burden of proof. As discussed above, this arbitrator ascribes to the position that:

> The imposition of a lesser burden than clear and convincing proof fails to give consideration to the harsh effect of summary discharge upon the employee in terms of future employment.[77]

However, in this case the Employer was able to show by a simple preponderance of the evidence that the remedy was appropriate. Utilizing the lower standard that applies in non-discharge cases the Employer may impose a final written warning on Deputy LaFrance.

Returning to the issue of the significant commonalities among the many charges leveled against Brian LaFrance, it should be noted that the critical and common components are:

1. Untruthfulness,
2. Incompetent Performance, and,

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[76] The facts in this case are the inverse of most of the cases on this subject, in which the employee is aware of his/her condition and the employer is oblivious.

[77] *General Telephone Co. of California*, 73 LA 531, 533 (Richman, 1979). See also: *Atlantic Southeast Airlines, Inc.*, 101 LA 515 (Nolan, 1993) (using clear and convincing standard); *J. R. Simplot Co.*, 103 LA 865 (Tilbury, 1994) (same); *Collins Food International, Inc.*, 77 LA 483, 484-485 (Richman, 1981) (same). The Employer bears this burden of proof both with respect to proving the alleged violation, and with respect to demonstrating the appropriateness of the penalty. *Pepsi-Cola Co.*, 104 LA 1141 (Hockenberry, 1995).

3. Failure to Follow Rules and Directives.

Had there been only a couple of episodes of untruthfulness, incompetent behavior and disregard for rules on the part of then Deputy LaFrance, I strongly suspect the County would have imposed a different and lesser level of discipline. The issue, as I stated at the outset of this Decision, is whether the County had just cause to discipline Deputy LaFrance. The County has shown by a preponderance of the evidence that it had just cause to issue three separate final written warnings to the Grievant.

Remedy

Since the Grievant was not fit for duty at the time of his discharge, he should be made whole by retroactively placing him in the position that he would otherwise have been in. Specifically, Deputy LaFrance should be allowed to access any benefits that an officer in good standing could have accessed as of his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by this Collective Bargaining Agreement. Since Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay per se, but may keep any Unemployment Insurance benefits for which he is monetarily eligible.

The Grievant should also be allowed to return to full duty upon passing independent psychological and physical fitness-for-duty exams as normally utilized by the Employer. The retroactivity of the return of the Grievant to regular status is not an issue in this case due to the lengthy continuance requested by the Guild and necessitated by Deputy LaFrance's heart attack.

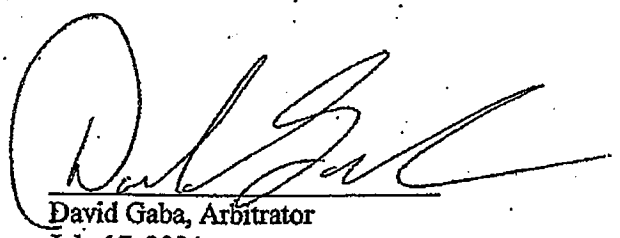
VIII. CONCLUSION

The grievance is granted in part and denied in part. The County's allegations of misconduct by former Deputy Brian LaFrance are upheld but the penalty imposed is reduced to three final written warnings.

IX. AWARD

The grievance is granted in part and denied in part. Kitsap County has met its burden of proof in showing that Brian LaFrance was disciplined with just cause. The discharge of the Grievant is rescinded and he is allowed access to any benefits available to disabled employees as of his date of discharge. The Employer may impose Final Written Warnings for Untruthfulness, Incompetent Performance, and, Failure to Follow Rules and Directives.

Since neither party prevailed in this matter all fees and expenses charged by the Arbitrator shall be borne equally by Kitsap County and the Kitsap County Deputy Sheriff's Guild per Section F (Grievance and Arbitration Procedure), 3. (Grievance Procedure), d. (Costs of Arbitration) of the Collective Bargaining Agreement.



David Gaba, Arbitrator
July 17, 2004
Seattle, Washington

X. APPENDIX D (KITSAP COUNTY MOTION TO PUBLISH)

No. 34321-5-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFF'S GUILD; and DEPUTY BRIAN LAFRANCE and JANE DOE LAFRANCE, and the marital community composed thereof, Appellant/ Cross-Respondent, v. KITSAP COUNTY and KITSAP COUNTY SHERIFF, Respondent/ Cross-Appellant	MOTION TO PUBLISH

Kitsap County and Kitsap County Sheriff, parties to this appeal, move pursuant to RAP 12.3(e) to publish the opinion of the Court filed on June 26, 2007.

GROUNDS AND ARGUMENT IN SUPPORT OF PUBLICATION

We are aware of no published decision of a state of Washington appellate court reviewing an arbitration decision under a constitutional writ of certiorari where the issue was the legality of reinstatement of a deputy sheriff who had violated his duties to the public. That reinstatement of a deputy sheriff with a proven record of dishonesty and incompetence might violate public policy was, before the Court's opinion, at least unsettled if not a new question of law.

Nor does the Court's opinion involve the application of a well-established legal rule to circumstances that the rule clearly applies to. The rule established by the court was not a rule that was beyond reasonable dispute.

Considering the extremely limited standard of review for arbitration awards, *Clark County PUD No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wn.2d 237, 246, 76 P.3d 248 (2003), another opportunity to provide precedential guidance on the question answered by the Court may not present itself again for a long time.

Unpublished opinions have limited exposure; often only the litigants in the case and institutional practitioners read them. Publication of the Court's decision will likely provide guidance to courts reviewing

arbitration decisions presenting similar issues. Publication will provide guidance to arbitrators reviewing grievances of deputy sheriffs discharged for conduct similar to Deputy LaFrance. Publication will likely promote judicial economy and efficiency by reducing or eliminating similar applications for writs of certiorari. Indeed, publication of the Court's opinion may serve to reduce the number of labor arbitrations where the issues are similar to the one presented to the arbitrator in this case.

The opinion of the Court is important, not only to these parties, but to law enforcement officers throughout the state of Washington, and to members of the public concerned about the integrity of law enforcement officers in this state. Public officials and employees in Washington are expected "to perform their public responsibilities in accordance with the highest ethical and moral standards and to conduct the business of the state only in a manner that advances the public's interest." *Hubbard v. Spokane County*, 146 Wn.2d 699, 712, 50 P.3d 602, 609 (2002), *quoting* Laws of 1994, ch. 154, §§ 1 and 121. Publication of the Court's opinion will alert public officials and employees to these standards, and provide assurance to members of the public that such standards exist and will be enforced.

CONCLUSION

For the foregoing reasons, Kitsap County and Kitsap County Sheriff respectfully request publication of the Court's decision.

Dated this 13th day of July, 2007.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney

JACQUELYN M. AUFDERHEIDE
WSBA No. 17374
Chief Deputy Prosecuting Attorney
Attorneys for Respondent/Cross-Appellant
KITSAP COUNTY and
KITSAP COUNTY SHERIFF

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On July 16, 2007, I caused to be served the above document, entitled MOTION TO PUBLISH, in the manner noted upon the following:

George E. Merker, III
CLINE & ASSOCIATES
1001 Fourth Avenue, Suite 2301
Seattle, WA 98154
Attorney for Appellant/Cross-Respondent

[ ] Via U.S. Mail
[X] Via Email: *GMerker@clinelawfirm.com*
[X] Personal Service

Brian and Jane Doe LaFrance
c/o George E. Merker, III
CLINE & ASSOCIATES
1001 Fourth Avenue, Suite 2301
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Pamela Loginsky
Washington Association of Prosecuting Attorneys
206 10th Ave SE
Olympia, WA 98501
Interested Third Party

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Howard M. Goodfriend
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Interested Third Party

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of September, 2006, at Port Orchard, Washington.

CARRIE BRUCE, Legal Assistant
Kitsap County Prosecuting Attorney
(360) 337-4814

XI. APPENDIX E (WAPA MOTION TO PUBLISH)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. II

KITSAP COUNTY DEPUTY SHERIFFS GUILD, Appellant/Cross-Respondent, v. KITSAP COUNTY, Respondent/Cross-Appellant.	NO. 34321-5-II THIRD PARTY MOTION TO PUBLISH OPINION

I. IDENTITY OF MOVING PARTY

The Washington Association of Prosecuting Attorneys, by and through its attorney, Pamela B. Loginsky, asks this Court for the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.3(e), the Washington Association of Prosecuting Attorneys ("WAPA") respectfully requests that the Court publish its June 26, 2007, opinion in *Kitsap County Deputy Sheriffs Guild v. Kitsap County*, COA No. 34321-5-II, in its entirety.

III. APPLICANT'S INTEREST

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those person are also the legal advisor to the thirty-nine elected county sheriffs.

WAPA is interested in cases, such as this, which will enhance public confidence in police officers. Undersigned counsel has surveyed the various counties has received overwhelming

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support for the instant motion to publish. Representatives of the Prosecuting Attorney in Benton County, Cowlitz County, Douglas County, King County, Kittitas County, Okanogan County, Pierce County, and Spokane County all urge publication of this motion. Some of these representatives indicated that similar arbitrator's rulings had been issued in their communities in the past. No county prosecutor's office has expressed any dissent to this motion to publish.

In addition to the counties listed above, legal advisors for the Spokane City Police Department, the Seattle City Police Department, and the Bellevue City Police Department also advised undersigned counsel that publication of this opinion would be of benefit to their client.

IV. REASONS PUBLICATION IS NECESSARY

Prosecuting attorneys have a constitutional obligation to advise defendants of material exculpatory evidence. *See generally Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This obligation even extends to information that is known to the police, but not to the prosecutor. *See generally Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). This obligation continues long after the conviction has been obtained. *In re Personal Restraint Petition of Gentry*, 137 Wn.2d 378, 397 n. 9, 972 P.2d 1250 (1999).

Police officers are advised of the requirements of *Brady* during their initial academy trainings and in continuing legal updates. Police officers are repeatedly informed that the sanction for lying or engaging in acts of deception will generally be termination as sustained findings of this type of misconduct will significantly reduce their effectiveness as witnesses. Publication of this opinion would provide an object lesson to officers.

Public concern regarding officers who are less than forthright is currently being paraded across the pages of the Seattle Post-Intelligencer and the Seattle Times. Publication of this opinion will assist the public in understanding some of the barriers that exist to disciplining officers and will demonstrate to the public the seriousness with which prosecutors take their obligations under *Brady*.

V. CONCLUSION

For the reasons stated above, that portion of the Court's decision of June 26, 2007, which indicated that the opinion would not be published should be stricken, and the opinion should

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be included in the official advance sheets.

Respectfully submitted this 2nd day of July, 2007.

PAMELA B. LOGINSKY
WSBA NO. 18096
Staff Attorney

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. II

KITSAP COUNTY DEPUTY SHERIFFS GUILD, Appellant / Cross-Respondent, v. Kitsap County, Respondent / Cross-Appellant.	NO. 34321-5-II THIRD PARTY MOTION TO PUBLISH OPINION

I. IDENTITY OF MOVING PARTY

The Washington State Association of Municipal Attorneys (WSAMA), a Not-For-Profit Washington Corporation, by and through the undersigned Daniel B. Heid, City Attorney for the City of the City of Auburn, Washington and Chair of the WSAMA Amicus Committee, respectfully moved the Court for the relief designated in Part II of this Motion.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to Rule 12.3(e) of the Rules of Appellate Procedure (RAP), WSAMA requests that the Court publish its decision in Kitsap County Deputy Sheriff's Guild; and Deputy Brian Lafrance and Jane Doe Lafrance, and the marital community composed thereof, Appellant/Cross-Respondent, versus Kitsap County and Kitsap County Sheriff, Respondent/Cross-Appellant, Cause Number 34321-5-II, dated June 26, 2007.

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III. MOVING PARTY'S INTEREST

WSAMA represents the city and town attorneys and prosecutors of the almost three hundred cities and towns in the State of Washington, ranging in population from Seattle, with almost six hundred thousand people to Krupp, with a population of about sixty. The attorneys for the state's cities and towns are responsible for prosecuting non-felony violations of the law occurring with in their corporate boundaries and representing the police departments and police officers of their cities and towns. These officers in turn work not only with their city and town attorneys and prosecutors in prosecuting non-felonies, but also with the prosecutors of the counties in which they are located on felony prosecution cases.

With that, the United States Constitutional imposes a duty on prosecutors to disclose evidence favorable to accused. The United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), held that the suppression by the prosecution of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. In the case of *U. S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the Supreme Court explicitly extended the principle of *Brady* to the due process clause of the Fifth Amendment to the Constitution, and the Court held that a prosecutor has a constitutional duty to volunteer exculpatory matter to the defense, even in the absence of a specific request for "*Brady* material," and the Court addressed the standard of materiality that gives rise to the duty to disclose *Brady* evidence. Subsequently, the Supreme Court held in *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), that evidence is material for *Brady* purposes if reasonable probability exists that, had the evidence been disclosed to the defense, the result of the

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proceeding would have been different.

As the Court recognized in its decision, the need for police to testify honestly is a public policy issue. If a police officer were to lie – as was the case in the matter at hand, that dishonesty triggers a *Brady* issue every time the dishonest police officer would have to testify in support of a criminal case. The whole integrity of the criminal justice system mandates that police officers testify and act honestly in the performance of their official duties. This is such a crucial facet of the criminal justice system that law enforcement agencies cannot afford to have dishonest police officers investigating and testifying in criminal cases, and society likewise cannot – should not have to contend with that - if it is to have any confidence in its courts and the criminal justice system.

It is distressing that the hearing examiner was able to overlook such serious honesty issues, and while this Court's reversal of the hearing examiner's position was absolutely appropriate, the issues are significant statewide and deserving to be recognized in a reported decision. It is appropriate for law enforcement agencies and for future hearing examiners to recognize the public policy issues and to be able to fully rely upon the principles of law espoused in this Court's decision.

V. CONCLUSION

For the above reasons, WSAMA respectfully requests that the Court's June 26, 2007, decision be published.

Respectfully submitted this 13th day of July, 2007.

Daniel B. Heid, WSBA# 8217, Attorney for WSAMA

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CERTIFICATE OF SERVICE

I, Daniel B. Heid, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I delivered a true and correct copy of the Third Party Motion to Publish Opinion and the notice of Appearance, of the Washington State Association of Municipal Attorneys, concerning the above entitled matter to:

George E. Merker III
Merker Law Offices
P.O. Box 11131
Bainbridge Islands, WA 98110-5131

Jacqueline Moore Aufderheide
Kitsap County Prosecutor's Office, Msc 35A
614 Division Street
Port Orchard, WA 98366-4691

by: ☐ personally serving on _____.

☒ depositing in the U.S. Mail, postage prepaid, to the above address.

☐ delivering to ABC Legal Messenger Service for delivery to the above address.

☐ depositing in City of Auburn Public Defender Box at Auburn City Hall.

☐ other _____;

SIGNED at Auburn, Washington, this 13th day of July, 2007.

Signature

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XIII. APPENDIX G (GOODFRIEND MOTION TO PUBLISH)

No. 34321-5-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFF'S GUILD; and DEPUTY BRIAN LAFRANCE and JANE DOE LAFRANCE, and the marital community composed thereof, Appellant/ Cross-Respondent, v. KITSAP COUNTY and KITSAP COUNTY SHERIFF, Respondent/ Cross-Appellant	NON-PARTY MOTION TO PUBLISH

1. Identity and Interest of Moving Parties.

The moving parties are Howard Goodfriend, of the law firm of Edwards, Sieh, Smith & Goodfriend, PS., and Mark Hutcheson, of the law firm of Davis Wright Tremaine, LLP.

Mr. Goodfriend is an appellate attorney representing several institutional and governmental employer-clients that are parties to collective bargaining agreements. Mr. Hutcheson is a labor lawyer who represents employers in negotiating, administering, and enforcing collective bargaining agreements, including the arbitration of grievances under collective bargaining agreements.

2. Relief Requested.

The moving parties seek publication of the court's opinion in the instant case, pursuant to RAP 12.3(e). A copy of the decision is attached as the appendix to this motion.

3. Grounds for Relief and Argument.

This court's decision establishes important precedent regarding the public policy exception to the finality of arbitration decisions interpreting collective bargaining agreements. Predicting how an arbitrator may rule or whether a court will enforce a labor arbitrator's decision is an extremely difficult enterprise. Publication of the court's decision will provide much needed guidance to practitioners in this area of the law, reducing litigation burdens imposed on parties to collective bargaining agreements, as well as on the courts, which ultimately must enforce those agreements and arbitrators' decisions interpreting them.

By finding explicit and well-defined principles of public policy under Washington state law, the court's decision clarifies that a court should refrain from enforcing an arbitration decision interpreting a collective bargaining in a manner that would require the employer to violate its duties to the public as established by the Legislature. This court's unpublished decision clarifies Washington law and is of substantial interest to Washington employers and their counsel. RAP 12.3(e)(4), (5).

Few Washington cases address the court's authority to refuse to enforce an arbitrator's decision interpreting a collective bargaining agreement, and those that do so, address the issue only in dicta. *See, e.g.*, ***Local Union No. 77, Intern. Broth. of Elec. Workers v. Public Utility Dist. No. 1, Grays Harbor County***, 40 Wn. App. 61, 67, 696 P.2d 1264 (1985) (acknowledging that "public policy is a ground for refusing to enforce a collective bargaining agreement," but rejecting employer's public policy argument in opposing motion to compel arbitration as premature). Even the federal courts, which routinely consider enforcement and objections to labor arbitration decisions under federal labor law, 29 USC § 185(a), rarely address the public policy basis for refusing to enforce an arbitrator's decision under a collective bargaining agreement.

See, e.g., ***Eastern Associated Coal Corp, v. United Mine Workers of America***, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000) (discussed in Opinion at 10-12).

The Legislature subjects both public and private employers to an increasingly complex set of statutory obligations resulting in numerous affirmative duties to the general public. By holding in this case that the arbitrator erred in interpreting a collective bargaining agreement in a manner that contravenes "a police officer's duties to the public" as established by statute (Opinion at 11), the court has addressed the public policy exception in a manner that will provide guidance to arbitrators and the superior courts, as well as to employers, labor unions, and their counsel.

4. Conclusion.

This court should publish its decision under RAP 12.3(e).

DATED this 13th day of July, 2007.

EDWARDS, SIEH, SMITH & GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
WSBA No. 14355

1109 First Avenue, Suite 500
Seattle, WA 98101-2988
(206) 624-0974

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 13, 2007, I arranged service of the foregoing Non-Party Motion to Publish, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ✓ Messenger [next day] ___ U.S. Mail ___ Overnight Mail
George E. Merker II Merker Law Offices P.O. Box 11131 Bainbridge, WA 98110-5131	✓ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail
Brian La France c/o George E. Merker Cline & Associates 1001 Fourth Ave., Suite 2301 Seattle, WA 98154	___ Facsimile ✓ Messenger [next day] ___ U.S. Mail ___ Overnight Mail
Jacquelyn Aufderheide Kitsap County Pros Office M/S 35a 614 Division St. Port Orchard, WA 98366-4691	✓ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail

DATED at Seattle, Washington this 13th day of July, 2007.

Tara D. Friesen

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KITSAP COUNTY DEPUTY SHERIFF'S GUILD; and DEPUTY BRIAN LAFRANCE and JANE DOE LAFRANCE, and the marital community composed thereof, Appellant/Cross-Respondent, v. KITSAP COUNTY and KITSAP COUNTY SHERIFF, Respondent/Cross-Appellant.	No. 34321-5-II UNPUBLISHED OPINION

PENOYAR, J. — The Kitsap County Sheriff's Office (the Sheriff) terminated Deputy Brian LaFrance for untruthfulness and erratic behavior. LaFrance and the Kitsap County Deputy Sheriff's Guild (the Guild) filed a grievance against his termination. The parties entered into arbitration, in accordance with their collective bargaining agreement. The arbitrator agreed that LaFrance had repeatedly been untruthful but decided that Kitsap County (the County) could not establish by clear and convincing evidence that termination was the proper form of discipline. It ordered the rescission of LaFrance's discharge and stated that LaFrance could return to full duty if he passed physical and psychological examinations. Ultimately, LaFrance did not feel that the County was acting to implement the arbitration award and he filed a complaint in superior court.

Prior to trial, the County filed for summary judgment; it also filed a petition for writ of certiorari requesting review and vacation of the arbitration award. Finding that no genuine issue of material fact existed as to the implementation of the arbitration award, the trial court granted the County's motion for summary judgment, but denied its petition for writ of certiorari. LaFrance and the Guild appeal the grant of summary judgment to the County and urge this court to grant them summary judgment instead. The County cross-appeals, arguing that the arbitration award was unenforceable, and, as such, the trial court was incorrect to deny its petition for writ of certiorari. We agree that the arbitration award was unenforceable as against public policy; we therefore reverse the trial court's denial of writ and vacate the arbitration award.

FACTS

i. Termination

The Sheriff, the County, and the Guild are parties to a collective bargaining agreement (CBA) covering deputy sheriffs employed by the Sheriff.

After increasing concerns about Deputy LaFrance's work and behavior, the Chief of Detectives, Chief Davis, sent Deputy LaFrance a notice of decision and pre-termination hearing on September 11, 2001. The notice listed 29 sustained misconduct incidents and their attendant policy violations. About two months later, a *Loudermill*[1] hearing was held, which LaFrance attended.

On November 29, 2001, Chief Davis sent LaFrance a notice of termination detailing the specific incidents and violations that were sustained against him, pursuant to the *Loudermill*

[1] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

hearing. Chief Davis sustained the majority of the incidents outlined in the notice of decision and pre-termination. The sustained incidents affected 13 cases and included: (1) seizure contrary to Department policy; (2) failure to document case in records; (3) failure to treat documents and records according to procedure; (4) failure to follow orders to turn in materials; (5) failure to turn in overtime slips; (6) failure to document investigative activity in report form; (7) failure to properly handle evidence (4 times); (8) lack of candor; (9) failure to secure arrest warrant; (10) failure to file charges; (11) misrepresentation; (12) keeping evidence in his trunk (including computer discs and CDs containing child pornography and a pornographic VHS tape); (13) having an unsecured handgun; (14) failure to complete reports; (15) delay in completion of reports and paperwork; (16) failure to file case with federal prosecutors after advising the prosecuting attorney to drop State charges; (17) failure to return personal property to arrestee or to admit said property into evidence; (18) failure to properly handle paperwork; (19) downloading pornographic images onto a County computer and transferring them to a Sheriff's office computer; (20) mishandling photo evidence and original reports from Washington State Patrol; (21) failure to follow up on an attempt to locate suspect; (22) mishandling evidence; (23) failure to forward follow-up reports to records; (24) and failure to submit a case to the Prosecutor's Office.

The Guild filed a grievance challenging LaFrance's termination on January 10, 2002, claiming that the termination was not supported by just cause and requesting that LaFrance be reinstated with full back pay and benefits. The Sheriff denied the grievance. The Guild then requested that LaFrance's grievance be submitted to the American Arbitration Association under

the terms of the CBA. An arbitrator heard the case in early 2004.

ii. Arbitration

The arbitrator issued its decision on July 21, 2004. It found that the applicable standard of review was just cause — whether the employer had just cause to terminate the employee. It further found that the applicable burden of proof was clear, cogent, and convincing evidence, rather than a preponderance of the evidence, as the County urged.

To determine whether the County had just cause to terminate LaFrance, the arbitrator looked at seven factors: (1) whether the company gave the employee forewarning of the possible disciplinary consequences of the employee's conduct; (2) whether the company's rule was reasonably related to the orderly, efficient, and safe operation of the company's business and the performance that the employer might properly expect from the employee; (3) whether, before administering discipline, the employer made an effort to discover if the employee did in fact violate or disobey a rule or order of management; (4) whether the employer's investigation was conducted fairly and objectively; (5) whether there was substantial evidence that the employee was guilty as charged; (6) whether the employee applied its rules, orders, and penalties evenhandedly and without discrimination; and (7) whether the degree of discipline administered was reasonably related to both the seriousness of the offense and the record of the employee in his service to the employer.

The arbitrator found that the County established the first six elements by clear and convincing evidence, but not the seventh. It found the degree of discipline to be too harsh under the circumstances.

Specifically, it found that LaFrance "was terminated due to his inability to perform his job

and his bizarre behavior" and not because he was the victim of a conspiracy, as he claimed. 7 Clerk's Papers (CP) at 78-79. However, it found that the County "failed to show by clear and convincing evidence that the penalty was appropriate for an employee who was clearly suffering from serious health problems." 1 CP at 82.

The arbitrator finally found that the County showed by a preponderance of the evidence that it had just cause to issue three separate final written warnings to LaFrance. It fashioned a remedy as follows:

> Since [LaFrance] was not fit for duty at the time of his discharge, he should be made whole by retroactively placing him in the position that he would otherwise have been in. Specifically, Deputy LaFrance should be allowed to access any benefits that an officer in good standing could have accessed as of his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by this [CBA]. Since Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay per se, but may keep any Unemployment Insurance benefits for which he is monetarily eligible.
>
> [LaFrance] should also be allowed to return to full duty upon passing independent psychological and physical fitness-for-duty exams as normally utilized by the [County]. The retroactivity of the return of [LaFrance] to regular status is not an issue in this case due to the lengthy continuance requested by the Guild and necessitated by Deputy LaFrance's heart attack.

1 CP at 83.

The arbitrator upheld the County's misconduct allegations but reduced the penalty to three final written warnings.

The award stated as follows:

> The grievance is granted in part and denied in part. Kitsap County has met its burden of proof in showing that Brian LaFrance was disciplined with just cause. The discharge of [LaFrance] is rescinded and he is allowed access to any benefits available to disabled employees as of his date of discharge. The [County] may impose Final Written Warnings for Untruthfulness, Incompetent Performance, and, Failure to Follow Rules and Directives.

1 CP at 84.

Because neither party prevailed, the arbitrator divided fees and expenses equally between the County and the Guild.

The County requested reconsideration, which the arbitrator denied, and the County and the Guild entered into settlement negotiations. The parties negotiated between September and December 2004, and LaFrance's employment was reinstated in October 2004. At that time, he was informed that he could return to full duty upon passing independent psychological and physical fitness-for-duty exams.

By December 2004, LaFrance felt that the County was not implementing the award and asked the Guild to seek its reinforcement. In March 2005, LaFrance was deemed physically fit to return to duty, and the police received a report that he was mentally fit for duty on April 6, 2005. On April 7, LaFrance was instructed to report to work on April 11 at which time he was assigned to a field-training officer for retraining. He was removed from full duty and placed on administrative leave with pay three months later when the Sheriff concluded that LaFrance was not fit for duty due to *Brady*[2] concerns about his ability to testify.

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194; 10 L. Ed. 2d 215 (1963) (a prosecutor must release information favorable to an accused upon request). If LaFrance were to testify as a witness in any criminal proceeding, the prosecutor would feel legally and ethically obligated under *Brady* to disclose LaFrance's history of untruthfulness to defense counsel.

iii. Trial Court

The Guild filed a complaint in Pierce County Superior Court for breach of contract and to enforce the arbitration award on December 17, 2004.[3] The County moved the court to dismiss for failure to state a claim, which the court denied. The County then filed a stay and petitioned for writ of certiorari to the Kitsap County Superior Court. The Guild filed a motion in that court requesting a change of venue, in order to consolidate the matter in Pierce County Superior Court, which the Kitsap County court granted.

The County then requested the Pierce County Superior Court for leave to assert an after-arising counterclaim — the petition for writ — and to add the Sheriff as a defendant. The Pierce County court granted the motion despite the Guild's opposition. The County then sought summary judgment on the issues in the Guild's complaint (breach of contract, enforcement of the arbitration award, and violations of the federal Fair Labor Standards Act (FLSA) and state wage laws). The Guild and LaFrance filed a cross-motion for summary judgment on the same issues.

The trial court found that the arbitrator had awarded reinstatement of LaFrance's employment effective November 29, 2001 (the date of his discharge), and that the award allowed LaFrance to access benefits that an officer in good standing could have accessed as of his discharge date. It also found that the arbitrator's award did not include an award of back wages, overtime, administrative leave pay, or any other wages. According to the trial court, the effective date of LaFrance's return to full duty and resumption of wages for hours worked was April 11, 2005 (after he had been cleared and reported for work). The court also noted that LaFrance was

[3] The complaint was later amended to include claims under the Fair Labor Standards Act and Washington State wage laws.

offered benefits when the County offered him an election between reinstatement of his leave benefits and payout of his leave benefits, but LaFrance never made an election. Finally, it found that the Guild's claim that the County breached the CBA when it did not remove letters regarding LaFrance's termination from his personnel file was a breach of contract claim and therefore subject to the CBA's mandatory arbitration provisions. Holding that no genuine issue of material fact existed, the court granted the County's motion for summary judgment and denied the Guild's.

The trial court also entered an order denying the County's petition for writ of certiorari, concluding that the trial court should not interfere "with the decision-making process that the parties negotiated and contracted to complete." Report of Proceedings (RP) (Dec. 15, 2005) at 31.

The Guild and LaFrance appeal the trial court's decision granting summary judgment to the County and the Sheriff. The County and the Sheriff cross-appeal the trial court's denial of their petition for certiorari.

ANALYSIS

I. Denial of Motion for Writ and Reversal of Arbitrator's Decision

The County argues that the arbitrator exceeded his jurisdiction and authority under the CBA by requiring reinstatement of LaFrance's employment after concluding that LaFrance was guilty of untruthfulness. In part, the County contends that the arbitrator offended public policy by reinstating LaFrance's employment after finding that he was guilty of untruthfulness. We agree.

Washington public policy strongly favors finality of arbitration awards. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Accordingly, our Supreme Court has set

out an extremely limited standard of review for arbitration awards. *Clark County PUD No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wn.2d 237, 246, 76 P.3d 248 (2003). Review of an arbitration decision under a constitutional writ of certiorari is limited to whether the arbitrator acted illegally by exceeding its authority under the contract. *Clark County PUD No. 1*, 150 Wn.2d at 245. When reviewing an arbitration proceeding, an appellate court does not reach the merits of the case. *Clark County PUD No. 1*, 150 Wn.2d at 245. The doctrine of common law arbitration states that the arbitrator is the final judge of both the facts and the law, and "no review will lie for a mistake in either." *Clark County PUD No. 1*, 150 Wn.2d at 245 (citing *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 785, 812 P.2d 500 (1991)).

However, as with any contract, a court may not enforce a collective-bargaining agreement that is contrary to public policy. *See W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983); *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000). If the contract as interpreted by an arbitrator violates some explicit, well-defined, and dominant public policy, we are not required to enforce it. *W.R. Grace & Co.*, 461 U.S. at 766 (citing *Hurd v. Hodge*, 334 U.S. 24, 35, 68 S. Ct. 847, 92 L. Ed. 1187 (1948) and *Muschany v. United States*, 324 U.S. 49, 66, 65 S. Ct. 442, 89 L. Ed. 744 (1945)).

In *E. Associated Coal Corp.*, the Supreme Court examined the legality of an arbitration award requiring an employer to reinstate a truck driver who had tested positive for marijuana. 531 U.S. at 59-60. The arbitrator had decided that the driver's positive drug test did not amount to "just cause" for discharge, as required by the parties' collective bargaining agreement. 531

U.S. at 60. Because the employer and the union granted the arbitrator the authority to interpret their agreement, the Court stated that, in order to properly consider the claim, it must assume that the collective bargaining agreement itself called for the reinstatement. 531 U.S. at 61. Therefore, the central issue of the case was whether a contractual reinstatement requirement would render the collective bargaining agreement void as against public policy. 531 U.S. at 62.

In that case, the court upheld the reinstatement provision, finding that the public policy against intoxicated drivers, as set out in the Omnibus Transportation Employee Testing Act of 1991, was balanced by the Act's equal emphasis on the public policy of rehabilitation. 531 U.S. at 64-65. Because the reinstatement award was not contrary to the several policies, taken together, the award was not void as against public policy. 531 U.S. 65.

In contrast, LaFrance's reinstatement violates several public policies regarding a police officer's duties to the public. For example, RCW 36.28.010 requires sheriff's deputies to arrest all persons who break the peace, defend the county against those who endanger public peace, execute court and judicial officer orders, and execute all warrants from other public officers. In violation of these clear duties, LaFrance mishandled evidence, neglected to obtain warrants, failed to follow through on cases with prosecutors, and generally conducted himself with a lack of candor.

Also in contrast to *E. Associated Coal Corp.*, here there are no "dominant" public policies favoring reinstatement. LaFrance repeatedly showed a lack of candor and inability to obey either sheriff's department policies, Washington Rules of Evidence, or direct orders from his superiors. Put simply, LaFrance's proven record of dishonesty prevents him from useful service as a law

enforcement officer. To require his reinstatement to a position of great public trust in which he cannot possibly serve violates public policy. Therefore, we must reverse the trial court's denial of the petition for writ of certiorari and vacate the arbitration award.

The balance of the issues raised by the parties are rendered moot by the foregoing, and we decline to address them.[4]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.

[4] The appellants included a request for attorney fees regarding FLSA and state wage law violations. However, the appellants did not prevail here, and their request is denied. Moreover, neither party devoted a section of their opening brief to the request for attorney fees as RAP 18.1(b) requires; we therefore deny an award of attorney fees to either party. *See Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996).

CERTIFICATE OF SERVICE

I, Debora G. Pettersen, Legal Assistant at Cline & Associates, declares, under penalty of perjury, under the laws of the State of Washington, that I served the Petition for Review to the Supreme Court of the State of Washington to which this Certificate of Service is attached in the following manner to the entities below listed:

Clerk Court of Appeals, Division I 950 Broadway, Suite 300 Tacoma, WA 98402	[ ] Via Facsimile [ ]Via U.S. Mail [X]Via Legal Mssngr [ ]Email
Jacquelyn Aufderheide Kitsap County Prosecuting Office M/A 35a 614 Division Street Port Orchard, WA 98366-4691 Jaufderh@MAIL1.CO.KITSAP.WA.US	[ ] Via Facsimile [ ]Via U.S. Mail [X]Via Legal Mssngr [ ]Email

I certify and acknowledge under the laws of the State of Washington that the foregoing is true.

DATED at Seattle, Washington, this 31st day of October, 2007.

Debora G. Pettersen